

Complaint of Discrimination

(see instructions on reverse)

PRIVACY ACT STATEMENT: 1. AUTHORITY-The authority to collect this information is derived from 42 U.S.C. Section 2000e-16; 29 CFR Sections 1614.106 and 1614.108.

2. PURPOSE AND USE-This information will be used to document the issues and allegations of a complaint of discrimination based on race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental), sexual orientation or reprisal.

The signed statement will serve as the record necessary to indicate an investigation will become part of the complaint file during the investigation; hearing, if any; adjudication; and appeal, if one, to the Equal Employment Commission.

3. EFFECTS OF NON-DISCLOSURE-Submission of this information is MANDATORY. Failure to furnish this information will result in the complaint being returned without action.

1. Complainant's Full Name [Redacted]	2. Your Telephone Number (including area code) Home [Redacted] Work [Redacted]
Street Address, R.D. Number or Post Office Box Number [Redacted]	
City, State and Zip Code [Redacted]	

3. Which Department of Justice Office Do You Believe Discriminated Against You? <u>Federal Bureau of Investigation</u>	4. Current Work Address <u>Unemployed</u>
A. Name of Office Which You Believe Discriminated Against You. <u>FBI Baltimore</u> <u>2200 Lord Baltimore St.</u> <u>Baltimore, MD 21244</u>	A. Name of Agency Where You Work <u>Unemployed</u>
B. Street Address of Office	B. Street Address of Your Agency <u>N/A</u>
C. City, State and Zip Code	City, State and Zip Code <u>N/A</u>
	Title and Grade of Your Job <u>N/A</u>

5. Date on Which Most Recent Alleged Discrimination Took Place Month Day Year <u>6</u> <u>13</u> <u>2008</u>	6. Check Below Why You Believe You Were Discriminated Against? <input checked="" type="checkbox"/> Race or Color (Give Race or Color) <u>African American</u> <input type="checkbox"/> Religion (Give Religion) _____ <input type="checkbox"/> Sex (Give Sex) <input type="checkbox"/> Male <input type="checkbox"/> Female <input type="checkbox"/> Sexual Harassment <input type="checkbox"/> Age (Give Age) _____ <input type="checkbox"/> National Origin (Give National Origin) _____ <input type="checkbox"/> Disability <input type="checkbox"/> Physical <input type="checkbox"/> Mental <input type="checkbox"/> Sexual Orientation <input type="checkbox"/> Reprisal <input type="checkbox"/> Parental Status <input type="checkbox"/> Class Complaint
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7. Explain how you were discriminated against (Treated differently from other employees or applicants) Because of Your Race, Color, Religion, Sex, Age, Handicap, Reprisal, or National Origin (You may continue your answer on another sheet of paper if you need more space).
During the polygraph test one agent [Redacted] accused me of lying about being a drug dealer and/or user when I have no juvenile or adult record of using or selling drugs. Additionally noone who has ever known me would accuse me

8. What Corrective Action Do You Want Taken on Your Complaint? <u>I would like to be given the opportunity to work for the Bureau of using/selling drugs in the [Redacted] for which I successfully completed (cont. on back) an interview and have worked hard all my life to obtain.</u>

9. A) I Have Discussed My Complaint With an Equal Employment Opportunity Counselor and/or other EEO Official: DATE OF FIRST CONTACT WITH EEO OFFICE: <u>09</u> <u>04</u> <u>2008</u> DATE OF RECEIPT OF NOTICE OF FINAL INTERVIEW WITH EEO COUNSELOR: <u>09</u> <u>15</u> <u>2008</u>	B. Name of Counselor: [Redacted] <input type="checkbox"/> I Have Not Contacted an EEO Counselor
---	---

10. Date of This Complaint: Month Day Year <u>09</u> <u>10</u> <u>2008</u>	11. Sign Your (Complainant's) Name Here: [Redacted]
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Revised filed 9/17/08 (post mark)

UML 9/25/08

FORM DOJ-201A
MAR. 2001

9/24/08

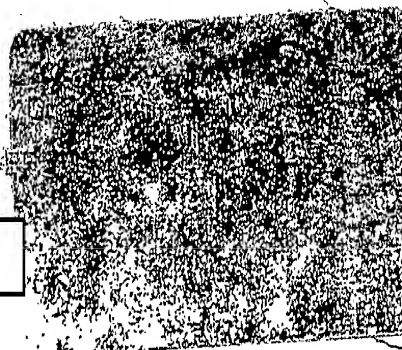
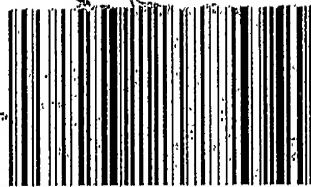
UA

The polygrapher immediately asked me as we sat down for the pre polygraph advisory talk to "just admit I had taken drugs or at least used marijuana." He followed that with "you've never been fired for being lazy have you?" The polygrapher (agent [redacted]) discriminated against me as a black man immediately codifying me as a drug dealing, substance abusing, and lazy liar. He was unyielding and forthcoming about the fact that I had to be a stereotypical black thug trying to hide an illicit drug history. Even after I explained to him how offensive his accusations were to me, he just responded with "well there's none of that (racism) here." I wouldn't be so adamant about race being a factor, but with my background of graduating from high school

[redacted], I had to fight this racist prejudicial lie being perpetrated against me. I was raised [redacted]

[redacted] full victim to drugs, and I promised myself I would be different just so I could acquire a great job from the F.B.I. so I deeply resent the fact that I was called a lazy, lying, drug dealing junkie by a man who doesn't know me, my stellar background, or my societal contributions. There is no evidence of me using or selling drugs because I never have done those things. So, just because I am young and black does not automatically denote that I have ever used any illegal drugs.

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**X-RAYED
CHEVERLY**

Office of EEO Affairs
Federal Bureau of Investigation
Room 7901
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535-0001

Opened & Inspected
SEP 23 2008
Mail Services #29

9101

20535+0001



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Track & Confirm

Search Results

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Label/Receipt Number

Detailed Results:

- Delivered, September 23, 2008, 4:08 am, WASHINGTON, DC 20535
- Notice Left, September 22, 2008, 10:01 am, WASHINGTON, DC 20535
- Arrival at Unit, September 22, 2008, 9:29 am, WASHINGTON, DC 20022
- Acceptance, September 17, 2008, 3:01 pm,

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No FEAR Act EEO Data

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U.S. Department of Justice

Complaint of Discrimination

(See instructions on reverse)

PRIVACY ACT STATEMENT: 1. AUTHORITY-The authority to collect this information is derived from 42 U.S.C. Section 2000e-16; 29 CFR Sections 1614.106 and 1614.108.

2. PURPOSE AND USE-This information will be used to document the issues and allegations of a complaint of discrimination based on race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental), sexual orientation or reprisal.

The signed statement will serve as the record necessary to indicate an investigation will become part of the complaint file during the investigation, hearing, if any, adjudication, and appeal, if one, to the Equal Employment Commission.

1. EFFECTS OF NON-DISCLOSURE-Submission of this information is MANDATORY. Failure to furnish this information will result in the complaint being returned without action.

1. Complainant's Full Name

2. Your Telephone Number (including area code)

Street Address, RD Number, or Post Office Box Number

Home

City, State and Zip Code

Work

3. Which Department of Justice Office Do You Believe Discriminated Against You?

4. Current Work Address

Federal Bureau of Investigation

Applicant

A. Name of Office Which You Believe Discriminated Against You

A. Name of Agency Where You Work

Polygraph Examiner

N/A

2600 Lord Baltimore Drive

B. Street Address of Your Agency

Windsor Mill, MD 21244

N/A

B. Street Address of Office

City, State and Zip Code

2600 Lord Baltimore Drive

N/A

C. City, State and Zip Code

Title and Grade of Your Job

Windsor Mill, MD 21244

Applicant

5. Date on Which Most Recent Alleged Discrimination Took Place

6. Check Below Why You Believe You Were Discriminated Against?

Month Day Year

☒ Race or Color (Give Race or Color) Black☐ Religion (Give Religion)☒ Sex (Give Sex) ☒ Male ☐ Female☐ Sexual Harassment☐ Age (Give Age)☐ National Origin (Give National Origin)☐ Disability ☐ Physical ☐ Mental☐ Sexual Orientation☐ Reprisal☐ Parental Status☐ Class Complaint

7. Explain how you were discriminated against (Treated differently from other employees or applicants) Because of Your Race, Color, Religion, Sex, Age, Handicap, Reprisal, or National Origin (You may continue your answer on another sheet of paper if you need more space).

During a polygraph examination I was told everything went well with the exception of the drug question. Examiner stated the test detected something. I have never used illegal drugs in my entire life. I have passed secret clearances.

8. What Corrective Action Do You Want Taken on Your Complaint?

I want my security background investigation to begin or be granted a second polygraph exam based on solely drug questions. I have never used illegal drugs.

9. A. I Have Discussed My Complaint With an Equal Employment Opportunity Counselor and/or other EEO Official

B. Name of Counselor

DATE OF FIRST CONTACT WITH EEO OFFICE

DATE OF RECEIPT OF NOTICE OF FINAL INTERVIEW WITH EEO COUNSELOR

06 | 17 | 2010

08 | 13 | 2010

☐ I Have Not Contacted an EEO Counselor

10. Date of This Complaint:

11. Sign Your (Complainant's) Name Here:

Month Day Year

08 | 13 | 2010

Deemed filed: 8/13/10 (Postmark) MCL 8/23/10

FORM 10-201A
MAR. 2001

READ CAREFULLY

- This form should be used only if you, as an applicant for Federal Employment or as a Federal Employee, think you have been discriminated against because of race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental), sexual orientation, parental status or reprisal by a FEDERAL agency, and have presented the matter for informal resolution to an Equal Employment Opportunity (EEO) Counselor within 45 calendar days of the date the incident occurred or, if a personnel action, within 45 calendar days of its effective date.

- Your complaint must be filed within 15 calendar days of the date of your receipt of the Notice of Final Interview with the EEO Counselor. If the matter has not been resolved to your satisfaction within 30 calendar days of you contacted the EEO Office and the final counseling interview has not been completed within that time, you have the right to file a complaint at any time thereafter up to 15 calendar days after your receipt of the Notice of Final Interview. These time limits will only be extended under limited circumstances.

- The EEO Counselor or the EEO Officer will assist you in preparing your complaint, upon request.

- Your written complaint should be filed by you with the EEO Officer for the Bureau where the alleged discrimination occurred

- You may have a representative at all stages of the processing of your complaint.

- You will have an opportunity to talk with an impartial investigator and present all the facts which you believe support your complaint of discrimination.

- After the investigation of your complaint has been completed, you will be furnished a copy of the investigative file. You will then be given an opportunity to request a final agency decision by the Department of Justice's Complaint Adjudication Officer (CAO) or a hearing before the Equal Employment Opportunity Commission (EEOC), which will be conducted by an Administrative Judge of the EEOC. At the hearing, which will be held at a convenient time and place, you may present witnesses and other evidence in your behalf.

- If your complaint is based upon sexual orientation or parental status, your investigative file will be reviewed by the Department of Justice's CAO and a final decision will be rendered with no entitlement for further administrative review.

- If a hearing is held on your complaint, the CAO will take final action on your complaint by issuing a final order. The final order will notify you whether or not the agency will fully implement the Administrative Judge's decision and it will explain your appeal rights. If you elect to have an immediate final agency decision without having a hearing, the CAO will take final action on your complaint by issuing a final agency decision which consists of findings on the merits of each issue in the complaint. The final agency decision will also include an explanation of your appeal rights.

- If you are not satisfied with the final order or agency decision, you have the right to file a written appeal with the EEOC, Washington, DC, within 30 calendar days after your receipt of the final order or final agency decision. A copy of your appeal must be provided to the agency at the same time it is filed with the EEOC.

- If your complaint is based on race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental) or reprisal, you also have the right to file a civil action in the appropriate Federal District Court:

- (a) Within 90 days of receipt of the final action on an individual or class complaint if no appeal has been filed;

- (b) Within 180 days of filing an individual or class complaint if an appeal has not been filed and final action has been taken;

- (c) Within 90 days of receipt of the Commission's final decision on appeal; or

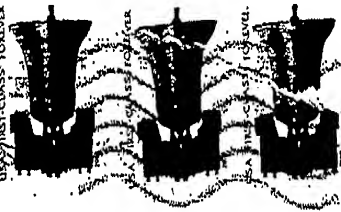
- (d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission

NOTE: Special statutory provisions (PL 93-259) relating to the right to file a civil action apply to age discrimination complaints. Please consult with your EEO Officer for assistance.



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WASHINGTON D.C.
19 AUG 2010



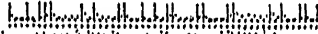
Equal Employment Opportunity Office
Federal Bureau of Investigation

Room 7901

935 Pennsylvania Avenue, Northwest
Washington, D.C. 20535-0002

Opened & Inspected
AUG 17 2010
Main Services #32

20535-0002



Complaint of Discrimination

(See instructions on reverse)

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1. Complainant's Full Name

Street Address, RD Number, or Post Office Box Number

City, State and Zip Code

2. Your Telephone Number (including area code)

Home

Work

3. Which Department of Justice Office Do You Believe Discriminated Against You?

Federal Bureau Of Investigation

4. Current Work Address

N/A

A. Name of Agency Where You Work

B. Street Address of Your Agency

C. City, State and Zip Code

D. Title and Grade of Your Job

B. Street Address of Office

935 Pennsylvania Ave

C. City, State and Zip Code

Washington D.C 20535

5. Date on Which Most Recent Alleged Discrimination Took Place

Month	Day	Year
11	02	2009

6. Check Below Why You Believe You Were Discriminated Against?

☐ Race or Color (Give Race or Color)☐ Religion (Give Religion)☐ Sex (Give Sex) ☐ Male ☐ Female☐ Sexual Harassment☐ Age (Give age)☐ National Origin (Give National Origin)☒ Disability ☐ Physical ☐ Mental☐ Sexual Orientation☐ Reprisal☐ Parental Status☐ Class Complaint

7. Explain How You Believe You Were Discriminated Against (treated differently from other employees or applicants) Because of Your Race, Color, Sex (including sexual harassment), Religion, National Origin, Age, Disability (physical or mental), Sexual Orientation, Parental Status, or Reprisal. Do not include specific issues or incidents that you have not discussed with your EEO Counselor. (You may continue your answer on another sheet of paper if you need more space.)

On October 1, 2009 I took my pre-employment polygraph examination. Upon conclusion of my exam, I received a very positive response from my polygraph examiner. He basically told me I passed my polygraph. Two weeks later, on October 13th 2009, I received a letter indicating that, based on the results of my polygraph examination, my conditional job offer has been rescinded. I strongly believe I was discriminated against [redacted] condition (which I stated before my polygraph examination) [redacted] that could have interfered with the results of my polygraph. This condition was also noted during my pre-employment physical examination. Subsequently, my request for a retake got denied. Therefore, I believe that my medical condition wasn't taken into account while determining my eligibility for a retake and that I have been mistreated.

8. What Corrective Action Do You Want Taken on Your Complaint?

I would like to retake my pre-employment polygraph examination. If after my retake, the results are the same as my first examination, then I will simply deem myself not suitable for employment with the Federal Bureau Of Investigation.

9. A) I have discussed my complaint with an Equal Employment Opportunity Counselor and/or other EEO Official.

B) Name of Counselor

DATE OF FIRST CONTACT WITH EEO OFFICE:

Month	Day	Year
11	06	2009

DATE OF RECEIPT OF NOTICE OF FINAL INTERVIEW WITH EEO COUNSELOR:

Month	Day	Year
12	30	2009

☐ I Have Not Contacted an EEO Counselor

10. Date of This Complaint:

Month	Day	Year
01	04	2010

11. Sign Your Name Here:

Deemed filed: 1/4/10 (Postmark)

MCL 1/13/10

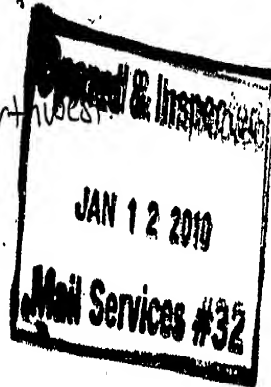
FORM DOJ-201A
MAR. 2001

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**RETURN RECEIPT
REQUESTED**

Equal Employment Opportunity Officer
Federal Bureau of Investigation
Room 7901
935 Pennsylvania Avenue, Northwest
Washington, D.C. 20535, 0001



2053550001



Complaint of Discrimination

(see instructions on reverse)

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1. Complainant's Full Name

2. Your Telephone Number (including area code)

Street Address, RD Number, or Post Office Box Number

Home

City, State and Zip Code

Work

3. Which Department of Justice Office Do You Believe Discriminated Against You? **FBI**

4. Current Work Address

A. Name of Office Which You Believe Discriminated Against You.

A. Name of Agency Where You Work

Polygraph Unit

B. Street Address of Your Agency

B. Street Address of Office

City, State and Zip Code

C. City, State and Zip Code

Title and Grade of Your Job

5. Date on Which Most Recent Alleged Discrimination Took Place

4 | **21** | **2010**
Month | Day | Year

6. Check Below Why You Believe You Were Discriminated Against?

☐ Race or Color (Give Race or Color)☐ Sexual Orientation☐ Religion (Give Religion)☐ Sex (Give Sex) ☐ Male ☐ Female☐ Sexual Harassment☐ Age (Give Age)☐ Parental Status☐ National Origin (Give National Origin)☐ Disability ☐ Physical ☐ Mental☐ Reprisal☒ Class Complaint

7. Explain how you were discriminated against (Treated differently from other employees or applicants) Because of your Race, Color, Religion, Sex, Age, Handicap, Reprisal, or National Origin (You may continue your answer on another sheet of paper if you need more space).

Please see attached.

8. What Corrective Action Do You Want Taken on Your Complaint?

Being able to re-take the polygraph test without being discriminated against and it be a fair test.

9. A) I Have Discussed My Complaint With an Equal Employment Opportunity Counselor and/or other

B. Name of Counselor:

EEO Official:

DATE OF FIRST CONTACT WITH EEO OFFICE:

DATE OF RECEIPT OF NOTICE OF FINAL INTERVIEW WITH EEO COUNSELOR

☐ I Have Not Contacted an EEO Counselor

Deemed filed 6/3/10 (Postmark)**MC 6/7/10****RA 6/7/10****W**

June 3, 2010

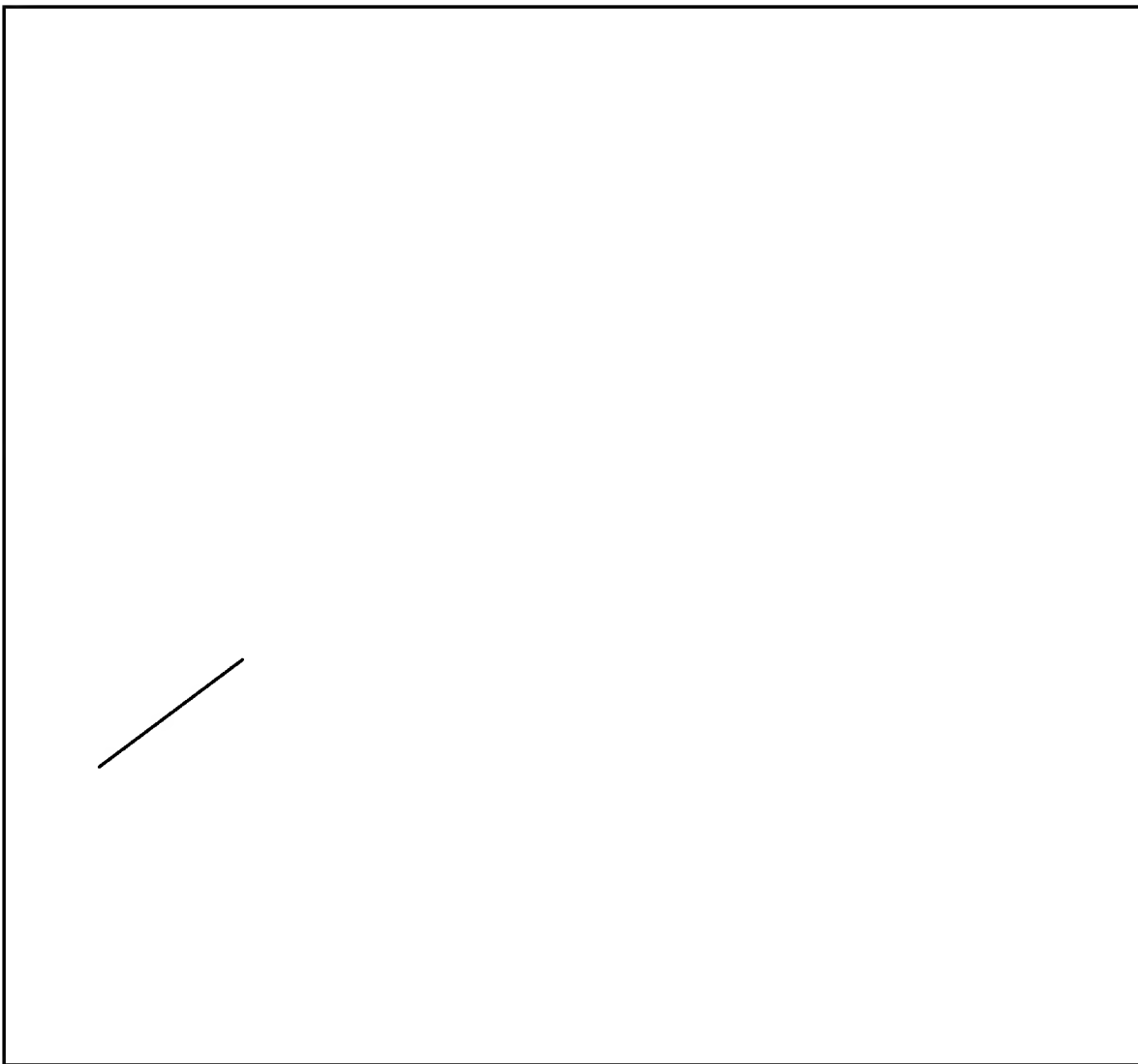
To whom it may concern,

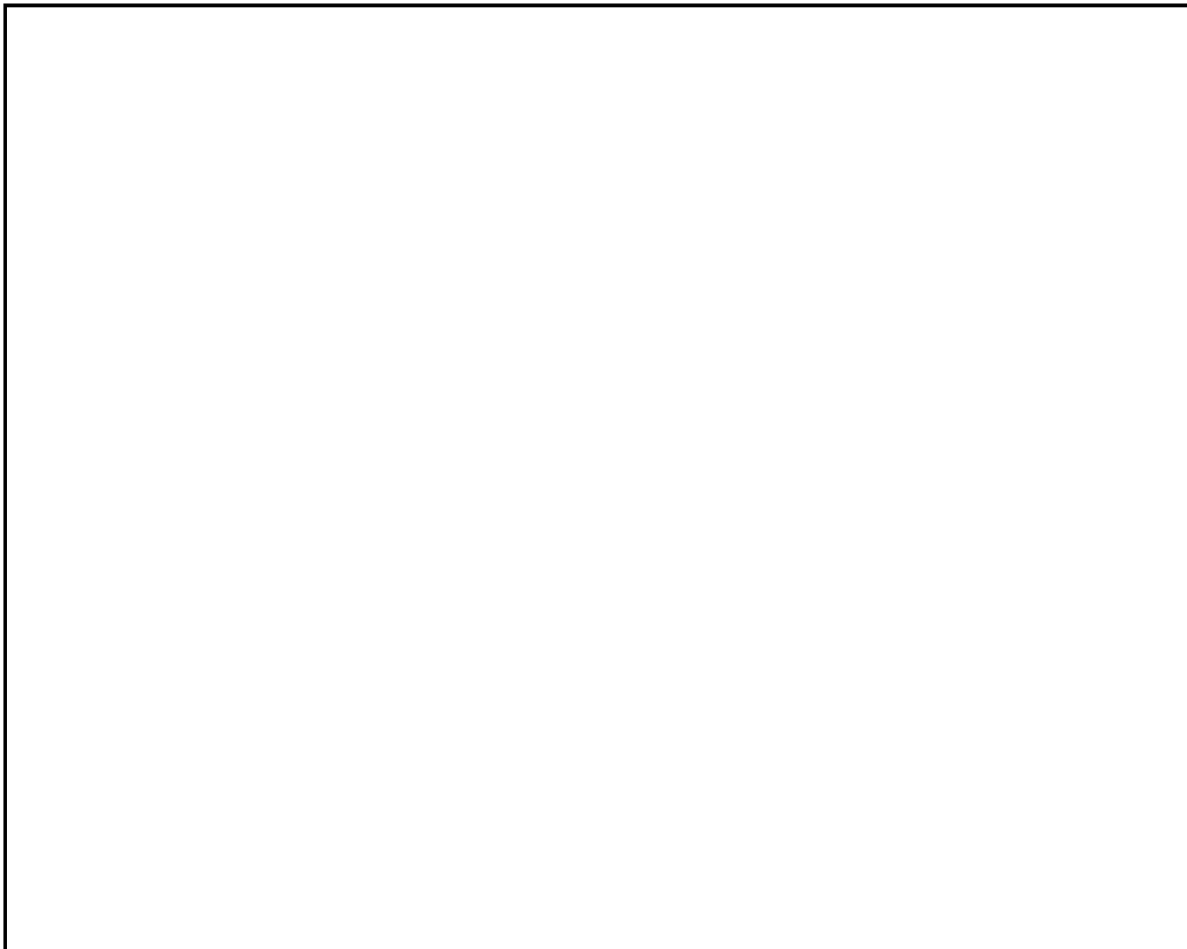
This letter is in further support of my [redacted] application for reconsideration of my request for a re-polygraph test.

- [redacted] I have been examined and investigated for security and other clearances, and have passed all tests and been approved for all clearances.

- In the current matter, I have already passed one polygraph test administered by [redacted] and all other investigations have been acceptable, resulting in my receiving a Top Secret clearance.

- After the polygraph test, which is the subject of this appeal, the Agency declined to continue my employment based upon the polygrapher's interpretation of my response to a question regarding whether I had ever been associated with a criminal.





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Based on all of the above, I request that the Agency permit me to undergo a further polygraph in order [redacted] by being denied the realization of my lifelong dream of being [redacted]

Thank you for your kind consideration of the above.

Respectfully yours,

[redacted]
Appeal letter 06 03 10

April 27, 2010

[REDACTED]

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Polygraph Appeal Board
935 Pennsylvania Ave.
Washington, D.C. 20935
Attn: Pugrv210
Fax: (202) 324-2754

Re: Appeal the Polygraph Test on Wednesday April 21, 2010 @ 1:00 pm

To Whom It May Concern:

Please accept this letter as an official appeal to the polygraph test administered for [REDACTED] on Wednesday April 21, 2010. This test, administered at approximately 12:50 p.m. at The Federal Bureau of Investigation (FBI) Washington Field Office (WFO), was the second event of the day, which was required for employment consideration with the FBI. [REDACTED]

[REDACTED]

[REDACTED] Prior to this polygraph test, I have successfully completed a number of separate background investigations and polygraph tests, which, I feel, is testament that I am suitable for and trustworthy of employment with the Federal Bureau of Investigation.

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I believe that I have a credible basis to appeal the results of the polygraph test mentioned above due to stresses and fatigue I experienced during the day of the polygraph test. On Wednesday April 21, 2010, I completed an interview with the [REDACTED] for the Federal Bureau of Investigation. [REDACTED]

[REDACTED]

Consequently, I encountered a barrage of questions that I was not prepared to answer and was taken completely out of the focus and mind set for the day. As I am sure you realize, interviews can be stressful and can become more stressful when interviewing with an agency that you have preferred as an employer for four (4) to five (5) years. Still, interviews can become most stressful when an interviewee is not given accurate, necessary information needed to prepare for an interview.

After completing the rigorous morning interview, I had to sit and wait for a polygraph administrator to become available. Fortunately, I was already at the Washington Field Office for [REDACTED] interview and was early for my polygraph test. However, I did not have time to leave the building for "fresh air" or to attain any lunch, to compose and refresh myself, before the polygraph test. I was assigned the first available polygraph test administrator, which added yet another dimension of stress to the day.

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[REDACTED]

[REDACTED] I sat with the polygraph administrator and answered his inquiries, honestly, as he asked multiple questions. The string of questions included, "When were you born", "Where were you born", "Have you ever taken a polygraph before", etc.

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[REDACTED]

After all of the preliminary input of data was complete, we began the polygraph test. At the conclusion of the polygraph test, I felt that the test had gone well, mainly because I answered all of the questions honestly and to the best of my ability. The administrator informed me that the test was complete and that he had to take the "jump drive" with my results to his manager and he would be right back. During his absence, I remained strapped to the chair, which was approximately ten (10) to fifteen (15) minutes, while the polygraph administrator conversed with his manager. Upon return, the polygraph administrator stated that we needed to redo the suitability questions and that he was going to substitute some questions. He asked me if I wanted to change any of my answers to the questions involved with the primary polygraph test. I told him "no" and he proceeded to administer the second polygraph test. After this test however, he stated that my results "spiked" at a specific question and asked if I could guess which question. I began to tell him which question I felt could have possibly "spiked". The question I felt that could have spiked was, [REDACTED] which I felt was a possibility because I have lied to my parents at one point or another about something. He shook his head and stated that my results spiked during the question of [REDACTED]. This completely confused me because I know that I have not. He began to interrogate me as if I was a criminal, which I am sure is procedure, but I was being truthful. He began to ask me what I was thinking when he asked me that particular question and I told him I thought, "This is the one question that, no matter what, I don't have to worry about, even though I could not fully remember the entire list [REDACTED]". Then he informed me that people sometimes spike at this question when someone they are close to [REDACTED] and he instructed me to think hard about what could have caused the "spike." At the time I told him there was nothing that I could recall that would cause that, besides, I would think everyone would have some sort of reaction about crimes as horrific as those. As he insisted

[REDACTED]

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[REDACTED]

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The special agent who was assigned to administer my polygraph stated that I was being untruthful about [REDACTED] [REDACTED] however, I know that I have not committed a [REDACTED] or been involved in a [REDACTED] There could be a number of reasons why my vitals spiked during the question about [REDACTED] I cannot give a definite reason why, however I am sure this letter shows various possibilities, aside from the fact that polygraph tests are not 100% accurate. However take into consideration something else your polygraph test also provided, which is a question that I answered multiple times that day, which is I had no intention to hide or lie about anything to the Federal Bureau of Investigation or the administrator of the polygraph test. If you agree to accept this letter as an appeal to the results of my polygraph test and I am sure that you will gain a qualified and able employee, as well as, someone who has worked tirelessly to become a part of the agency that ensure the freedoms and liberties of the people of the United State of America, The Federal Bureau of Investigation.

b7E

Please feel free to contact me at the above states address, phone number, and / or e-mail if you have any questions or concerns. Thank you for your time and consideration in this matter.

Sincerely,

[REDACTED]

b6

July 12, 2010

To whom it may concern:

During the month of November 2010, I began the process of becoming [redacted] of the Federal Bureau of Investigation. As a condition of employment, I had to, successfully, pass a background investigation and polygraph test before my employment could officially begin. At this time, I have passed the background test, yet I have been impeded from successfully completing the polygraph examination because of an unfortunate coincidence. This coincidence can best be described as an increasing number of applicants with middle and lower economic backgrounds failing the polygraph portion of the security examination through a singular question asked during the examination. [redacted]

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[redacted] is the question that seemingly gives life to this coincidence and life to suspicion that this question does not represent a "fair" polygraph question. It is very suspicious that the individuals cited within this group can fail the polygraph without any documented criminal history but because of one individual's perception of the candidate or the candidates' background. If your theory about candidates' undocumented involvement in [redacted] is correct, it seems it is safe to say that there has been a breakdown in the law enforcement system of the United States of America. I do not believe this breakdown exists just as I am sure that the coincidence mentioned in this letter should not exist.

b7E

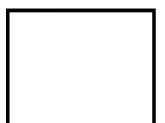
The problem of applicants failing out of background based on the single question of [redacted] [redacted] has been acknowledge by the Federal Bureau of Investigation's Human Resources Department in May 2010. I am a victim of this coincidence and humbly ask that I be granted the opportunity to prove my innocence and suitability to be an agent in the Federal Bureau of Investigation in, a country where an individual is innocent until proven guilty, the United States of America. Thank you for your time.

b7E

Thank You

b6

RECEIVED
2010 JUL 14 P 2:11
OFFICE OF EEO AFFAIR



U.S. Department of Justice
Federal Bureau of Investigation
Washington, D.C. 20535

05/18/2010



b6

Dear 

Your letter regarding the results of your pre-employment polygraph examination on 04/21/2010 has been referred to me for a response.

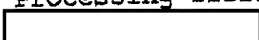
Your request for an additional pre-employment polygraph examination has not been authorized. Although the FBI does offer a polygraph retest under certain circumstances, you do not meet the criteria required and will not be afforded further consideration for employment. Our hiring policies provide no further avenues for you to pursue to gain employment with the FBI.

Your interest in employment with the FBI has been appreciated, and it is unfortunate that we are unable to offer you a more favorable decision.

Sincerely yours,

Paul S. White
Section Chief
Security Division

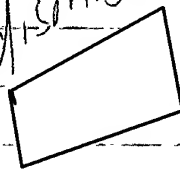
Processing field office: WF



b6

- class dismissed.

- Withdraw
before
accepted
or dismissed.



b6

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE
131 M Street, N.E.
Washington, D.C. 20507

[Redacted]

Complainant,

v.

Eric Holder,
Attorney General,
U.S. Department of Justice,
Agency.

EEOC No. [Redacted]

b6

Agency No. [Redacted]


Date: February 9, 2012

ORDER OF DISMISSAL

Notice is hereby given that the above captioned case is DISMISSED from the hearings process based on the Class Agent's withdrawal of her request for a hearing. Accordingly, the above-captioned complaint is sent back to the Agency for the appropriate processing of her individual complaint.

This office is also enclosing a copy of the hearing record and the Report of Investigation for the Agency.

IT IS SO ORDERED.



Frances I. del Toro
Administrative Judge

RECEIVED
2012 FEB 15 A 10:03
OFFICE OF EEO AFFAIRS

1 RECEIVED

Noted OGC
2/15/2012
2-15-2012

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing documents within five (5) calendar days after the date they were sent *via* first class mail. I certify that on February 9, 2012, the foregoing documents were sent *via* first class mail and *via* facsimile to the following:

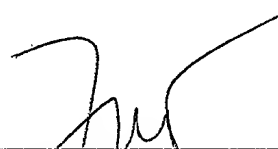


Federal Bureau of Investigation
Office of the General Counsel, Employment Law Unit
935 Pennsylvania Avenue, NW
Room PA-400
Washington, DC 20535-0001

b6



Equal Employment Opportunity Officer
FBI
Washington, DC 20535-0001



Frances del Toro
Administrative Judge

HEARING RECORD

FRANCES DELTORO - RE: [REDACTED] Class Complaint, EEOC Case Number [REDACTED]
[REDACTED] Agency Case Number FBI [REDACTED]

From: [REDACTED] (OGC)(FBI)" [REDACTED]
To: [REDACTED] FRANCES DELTORO
Date: 2/8/12 6:29 PM
Subject: RE: [REDACTED] Class Complaint, EEOC Case Number [REDACTED] Agency Case
Number FBI [REDACTED]

Judge del Toro,

The Agency concurs with [REDACTED] request and respectfully requests that [REDACTED] class claims be dismissed and that the case be processed and investigated by the Agency as an individual complaint.

The parties' responses to your January 20, 2012 request for information are due next Friday, February 17. Please let us know if you need any additional information from us at this time or if the parties' joint request to dismiss the class claims will be granted and the requests for information withdrawn.

Thank you, and please do not hesitate to contact me further regarding this matter.

[REDACTED]

[REDACTED]
Assistant General Counsel
Office of the General Counsel
Federal Bureau of Investigation
[REDACTED]

THIS EMAIL MAY BE PROTECTED BY THE ATTORNEY CLIENT PRIVILEGE AND MAY NOT BE DISSEMINATED WITHOUT PRIOR OGC APPROVAL. Documents which accompany this electronic message may contain metadata. It is my express intention to only deliver the documents in plain visible form. Access to any metadata is not authorized.

From: [REDACTED]
Sent: Wednesday, February 08, 2012 5:23 PM
To: FRANCES DELTORO
Cc: [REDACTED] (OGC)(FBI)
Subject: Re: [REDACTED] Class Complaint, EEOC Case Number [REDACTED] Agency Case Number FBI- [REDACTED]

Good evening Your Honor,

I have discuss my case in great detail with [REDACTED] and have decided to pursue this case as my own individual case. Please accept this email as a request to withdraw my class claims and proceed as an individual complaint.

I apologize for any inconvenience.

If you have any questions please feel free to contact me with the information provided below.

Thank you for your time and attention in this matter.

Respectfully Submitted,

[Redacted]

On Thu, Feb 2, 2012 at 2:16 PM, FRANCES DELTORO [Redacted] wrote:
The requests for an extension are granted. Responses will now be due on
February 17, 2012. No further extensions shall be granted.

Frances del Toro
Administrative Judge
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, D.C. 20507
Office No [Redacted]
Fax No [Redacted]

b6

>>> [Redacted] 02/02/12 12:43 PM >>>
To whom it may concern:

I would also like to request a two week extension. I received the
request for information in the mail yesterday. I spoke to [Redacted]
today and I plan to work with her to , hopefully, resolve this issue.

If there are any questions please feel free to contact me with the
information provided below.

R/S

[Redacted]

b6

Sent from my iPhone

On Feb 1, 2012, at 6:30 PM, [Redacted] (OGC)(FBI)"
[Redacted] wrote:

> [Redacted]
>

> On January 20, 2012, Judge del Toro issued an order requesting
additional information from you and the FBI. You should have received a
copy of the order by mail. I've attached a copy of the order for your
review.

>

> As you'll see, the order directs both parties to provide information
by February 6, next Monday. In my below email, I've requested a two-week
extension to submit the information requested from the FBI.

>
> I left a voicemail on your home number earlier today. Please feel free
to call me to discuss the case and next steps in more detail. My phone
number is [REDACTED]

>
> Thank you,

> [REDACTED]

b6

> [REDACTED]
> Assistant General Counsel
> Office of the General Counsel
> Federal Bureau of Investigation

> [REDACTED]

>
> THIS EMAIL MAY BE PROTECTED BY THE ATTORNEY CLIENT PRIVILEGE AND MAY
NOT BE DISSEMINATED WITHOUT PRIOR OGC APPROVAL. Documents which
accompany this electronic message may contain metadata. It is my
express intention to only deliver the documents in plain visible form.
Access to any metadata is not authorized.

>
> From: [REDACTED]
> Sent: Wednesday, February 01, 2012 5:29 PM
> To: [REDACTED] (OGC)(FBI)
> Cc: FRANCES DELTORO
> Subject: Re: [REDACTED] Class Complaint, EEOC Case Number
[REDACTED] Agency Case Number [REDACTED]

>
> To whom it may concern,

>
> Where I am appreciative that my case is still active in the system,
I'm disappointed that I have not been included on the status of my case
since receiving documentation that my submission was received. I would
like a full briefing on my case and the way ahead before anything is
submitted on my behalf.

b6

>
> I thank you in advance for your time and attention in this matter and
look forward to hearing from your office.

>
> Sincerely,

> [REDACTED]

> Sent from my iPhone

>

> On Feb 1, 2012, at 2:06 PM, "[REDACTED] (OGC)(FBI)"

> [REDACTED] wrote:

>

> Judge del Toro,

>

> I have copied Complainant [REDACTED] on this email chain.

>

> Thank you,

>

> [REDACTED]

b6

>

>

>

> [REDACTED]

> Assistant General Counsel

> Office of the General Counsel

> Federal Bureau of Investigation

>

> [REDACTED]

>

>

> THIS EMAIL MAY BE PROTECTED BY THE ATTORNEY CLIENT PRIVILEGE AND MAY NOT BE DISSEMINATED WITHOUT PRIOR OGC APPROVAL. Documents which accompany this electronic message may contain metadata. It is my express intention to only deliver the documents in plain visible form. Access to any metadata is not authorized.

>

>

> From: FRANCES DELTORO [mailto:[REDACTED]]

> Sent: Wednesday, February 01, 2012 1:12 PM

> To: [REDACTED] (OGC)(FBI)

> Subject: Re: [REDACTED] Class Complaint, EEOC Case Number

> [REDACTED] Agency Case Number [REDACTED]

>

> Do you have Complainant's e-mail so she can be copied on my response?

If not, then you need to file a> U.S. Equal Employment Opportunity Commission

b6

> 131 M Street, N.E.

> Washington, D.C. 20507

> Office No. (202) 419-0726

> Fax No. (202) 419-0701

>

> >>> [REDACTED] (OGC)(FBI)" [REDACTED] 2/1/12

12:38 PM >>>

> Judge del Toro,

>

> I left you a voicemail yesterday, but I wanted to follow up with an email in case you are traveling and have limited access to voicemail.

>

> I am the FBI's representative in the EEO Class Complaint of [REDACTED]
> [REDACTED] v. Holder, EEOC Case Number [REDACTED] Agency Case Number [REDACTED] b6
> FBI [REDACTED] On January 20, 2012, you sent a request for additional
> information regarding complainant's class complaint and the Agency's
> position. You have asked for the information to be provided by February
> 6.

>
> Due to delays with mail processing, I did not receive your request
> until January 30, approximately one week before the Agency's position is
> due. I would like to request a brief two-week extension until February
> 20, 2012 to provide the Agency's response. The Agency intends to file a
> submission opposing class certification, and the Agency also intends to
> include a motion to dismiss. Given the delay in receipt of your order,
> as well as previously set deadlines in other matters, the Agency
> requires an additional two weeks to submit a full response.

>
> Please let me know whether you would be willing to grant this brief
> extension.

>
> Thank you very much for your consideration, and please do not hesitate
> to contact me if you wish to further discuss this matter,

>
> [REDACTED]

>
>
>
> [REDACTED]
> Assistant General Counsel
> Office of the General Counsel
> Federal Bureau of Investigation

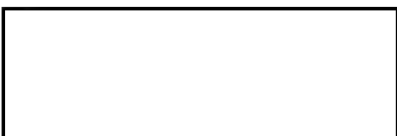
> [REDACTED] b6
>
>
>

>
> THIS EMAIL MAY BE PROTECTED BY THE ATTORNEY CLIENT PRIVILEGE AND MAY
> NOT BE DISSEMINATED WITHOUT PRIOR OGC APPROVAL. Documents which
> accompany this electronic message may contain metadata. It is my
> express intention to only deliver the documents in plain visible form.
> Access to any metadata is not authorized.

>
>
> <[REDACTED]Request for Information.pdf>

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE
131 M Street, N.E.
Washington, D.C. 20507**

January 20, 2012



Federal Bureau of Investigation
Office of the General Counsel
Employment Law Unit
935 Pennsylvania Avenue, NW
Room PA-400
Washington, DC 20535-0001

b6

RE: EEO Class Complaint of [REDACTED]

EEOC Case Number: [REDACTED]

Agency Case Number: [REDACTED]

Dear Parties:

The above-referenced class complaint of discrimination is currently before the Equal Employment Opportunity Commission (EEOC) pending a decision to recommend to the Agency that it either accept or dismiss the class complaint.

Under 29 C.F.R. §1614 (2011), a class complaint may be dismissed for any of the reasons listed in 29 C.F.R. §1614.107 or because it does not meet the prerequisites of a class complaint under 29 C.F.R. §1614.204(a)(2).

At this time the EEOC lacks sufficient information to determine whether the Agency should accept or dismiss the class complaint. The following information is therefore requested, pursuant to 29 C.F.R. § 1614.204(d).

The class agent is directed to provide the following information:

1. Specifically and clearly identify each of the employment actions that are the subject of your complaint. With regard to each of the employment actions that are the subject of your complaint (e.g., performance evaluations, fellowships and training, freedom of information and privacy act, awards, promotions/hiring, time-in-grade prior to promotions [either career or competitive], opportunities to act in supervisory positions, reassignments, grievance/EEO program, and reprisal), specify the questions of law or fact that are common to your individual claims and the claims of the class that you seek to represent, *i.e.*, how is your claim typical of the

claims of employees/former employees in other divisions of the Agency and in other classifications and grade levels? Regarding each of the personnel actions challenged, explain the specific practice you are challenging and specify whether there is a centralized administration and/or decision-making system within and among the Agency's divisions that governs these employment actions.

2. How many individuals do you contend have been adversely affected by each of the employment policies or practices that you allege to be discriminatory? How did you make this determination? Present any available statistical evidence related to this determination.

3. Who are the specific individuals you contend have been adversely affected by each of the employment policies or practices that you allege to be discriminatory and what are their job classifications? How have each of these individuals been affected? Where are these individuals employed, including geographically and by organizational and departmental unit?

4. Provide an exhaustive list of all of the divisions within the Agency in which individuals included within your class complaint are or were employed, and specify the number of putative class members in each division. Explain whether these divisions share a centralized administration and/or supervision system. Provide an organizational chart that shows the respective position of each of these divisions within the Agency and specify the number of employees of the same protected class(es) as you within each division.

5. With regard to your employing organization, provide an organizational chart and specify the number of employees of the same protected class(es) as you within this organization and within each of the subunits in this organization.

6. What is the nature of the Agency's management organization as it relates to the degree of centralization and uniformity of the personnel practices at issue in the complaint?

7. If your complaint includes allegations involving performance evaluations, does your class complaint encompass only those employees of the same protected class(es) as you who are evaluated pursuant to a general Agency appraisal system, or does it also include employees evaluated pursuant to other performance evaluation systems? If it includes other evaluation systems, identify these systems and provide any statistical information or other information that supports your claim of discrimination arising from these systems. Additionally, explain how you, an employee evaluated pursuant to one system, can represent employees evaluated pursuant to another system. Provide any information that shows that the relevant appraisal system mandates a uniform employment practice, rather than merely setting out procedures or steps through which employees are evaluated.

8. What is the time span covered by your allegations?

9. Typically, a class must be represented by an attorney experienced in class action litigation in the relevant field. Provide a statement from your attorney outlining his/her experience in Title VII litigation, with specific reference to class action litigation. Specify how you intend to finance the cost of the class action proceeding, including paying for attorneys fees

and other costs necessarily incurred in acting as the agent in a class action proceeding. If you are not represented by an attorney, what efforts have you made to retain an attorney to represent you and the putative class in this matter? Do you intend to retain an attorney in the future?

10. Provide any other information relevant to a determination of whether your complaint meets the prerequisites of a class complaint under 29 C.F.R. §1614.204(a)(2).

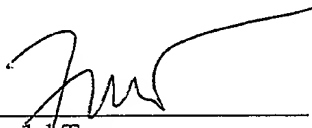
The Agency representative shall provide the following information:

1. A statement of the Agency's position on whether the complaint meets the requirements of numerosity, commonality, typicality, and adequacy of representation, as required by 29 C.F.R. §1614.204(a)(2) and whether the complaint should be dismissed for any other reason under 29 C.F.R. §1614.

2. Any other information and/or comments that you may have with respect to any other items addressed to Complainant above.

Lastly, you must respond by no later than **February 6, 2012**. The response must be received by this office by said date. If you do not respond in a timely fashion, the EEOC will apply appropriate sanctions, including the possibility of drawing and adverse inference or recommending that the Agency dismiss the complaint pursuant to 29 C.F.R. §1614.204(d).

SO ORDERED.



Frances del Toro
Administrative Judge

Tel.

Fax No.

b6

Complaint of Discrimination

(See instructions on reverse.)

PRIVACY ACT STATEMENT: 1. AUTHORITY- The authority to collect this information is derived from 42 U.S.C. Section 2000e-16; 29 CFR Sections 1614.106 and 1614.108. 2. PURPOSE AND USE- This information will be used to document the issues and allegations of a complaint of discrimination based on race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental), sexual orientation or reprisal.

The signed statement will serve as the record necessary to initiate an investigation and will become part of the complaint file during the investigation; hearing, if any; adjudication; and appeal, if one, to the Equal Employment Opportunity Commission. 3. EFFECTS OF NON-DISCLOSURE- Submission of this information is MANDATORY. Failure to furnish this information will result in the complaint being returned without action.

1. Complainant's Full Name [Redacted]	2. Your Telephone Number (including area code) Home [Redacted] Work [Redacted]
Street Address, RD Number, or Post Office Box Number [Redacted]	
City, State and Zip Code [Redacted]	

3. Which Department of Justice Office Do You Believe Discriminated Against You?

Federal Bureau of Investigation

B. Street Address of Office

7799 Leesburg Pike, Suit 200

C. City, State and Zip Code

Falls Church, Virginia 22043

4. Current Work Address
[Redacted]A. Name of Agency Where You Work
[Redacted]B. Street Address of Your Agency
[Redacted]C. City, State and Zip Code
[Redacted]D. Title and Grade of Your Job
[Redacted]

5. Date on Which Most Recent Alleged Discrimination Took Place

Month Day Year

10 24 05

6. Check Below Why You Believe You Were Discriminated Against?

- ☐ Race or Color (Give Race or Color) _____
☐ Religion (Give Religion) _____
☐ Sex (Give Sex) ☐ Male ☐ Female
☐ Sexual Harassment
☐ Age (Give age) _____
☐ National Origin (Give National Origin) _____
☒ Disability ☐ Physical ☒ Mental

- ☐ Sexual Orientation
☐ Reprisal
☐ Parental Status
☐ Class Complaint

7. Explain How You Believe You Were Discriminated Against (treated differently from other employees or applicants) Because of Your Race, Color, Sex (including sexual harassment), Religion, National Origin, Age, Disability (physical or mental), Sexual Orientation, Parental Status, or Reprisal. Do not include specific issues or incidents that you have not discussed with your EEO Counselor. (You may continue your answer on another sheet of paper if you need more space.)

On October 24, as applicant for [Redacted] failed Polygraph and told no further processing would be possible. Have mental disabilities/medications that cause me to have greater than average tendency to fail Polygraph. FBI fully informed of medical history prior to Polygraph. In this case, use of ability to "pass" Polygraph as requirement for full adjudication constitutes discrimination. see attached

8. What Corrective Action Do You Want Taken on Your Complaint?

- 1) Polygraph results classified as "NO OPINION"
- 2) OPM psychiatric/psychological adjudication to determine suitability, loyalty
- 3) Proceed with full Background Check/Adjudication
- 4) Position to remain available as offered until completion of 3)

9. A) I have discussed my complaint with an Equal Employment Opportunity Counselor and/or other EEO Official.

DATE OF FIRST CONTACT WITH EEO OFFICE:

11 02 05

DATE OF RECEIPT OF NOTICE OF FINAL INTERVIEW WITH EEO COUNSELOR:

11 9 05

B) Name of Counselor
[Redacted]☐ I Have Not Contacted an EEO Counselor

10. Date of This Complaint:

Month Day Year
11 15 05

b6

NOTICE OF RIGHT TO FILE A DISCRIMINATION COMPLAINT

SUBJECT: NOTICE OF RIGHT TO FILE A DISCRIMINATION COMPLAINT

FROM:

DATE: 11/9/2005

b6

TO:

(Name of Person Counseled)

This is to inform you that because the matter you brought to my attention has not been resolved to your satisfaction, you are now entitled to file a discrimination complaint based on race, color, religion, sex, national origin, physical or mental handicap, age, sexual orientation and/or reprisal. If you file a complaint, it must be in writing, signed, and filed, in person or by mail within 15 calendar days after receipt of this notice.

You will be provided a form (DOJ 201-A) for filing your complaint. If filed by mail, it must be done through the U.S. Post Office Department since the postmark is used to determine the date filed. The internal FBI mailing system is not acceptable. It is preferred that the complaint be filed with the Bureau's Equal Employment Opportunity Officer; however, any of the following officials are authorized to receive discrimination complaints:

Equal Employment Opportunity Officer
Federal Bureau of Investigation
Room 7901
935 Pennsylvania Avenue, Northwest
Washington, D.C. 20535-0001

Black Affairs Program Manager

or

Federal Women's Program Manager

or

Hispanic Employment Program Manager

or

Selective Placement Program Manager

(These individuals are located at the same address as listed above for the FBI's EEO Officer.)

Director
Federal Bureau of Investigation
Room 7176
935 Pennsylvania Avenue, Northwest
Washington, D.C. 20535-0001

(Rev. 2/2003)

Special Agent in Charge
Field Office
Field Office Address

Director, Equal Employment Opportunity
(Assistant Attorney General for Administration)
U.S. Department of Justice
10th & Constitution Avenue, Northwest
Washington, D.C. 20530

If you file your complaint with any of the above FBI officials (other than the EEO Officer), it will be sent to the EEO Office for processing. Also, if you choose to file your complaint with any of the other officials listed above, be sure to provide a copy of your complaint to the EEO Office to ensure prompt processing.

In addition, if you file your complaint or a copy of same with the Department of Justice (DOJ), ensure that you carefully review and comply with the instructions regarding the dissemination of complaint material as contained in the Prohibited Communications form furnished you. This is necessary since not all employees of the DOJ have top secret clearances. It should be emphasized that a complainant may not wittingly or unwittingly disclose sensitive/classified information to individuals/agencies not having the appropriate security clearance to receive such information. To avoid inadvertent disclosure of sensitive or classified information that may be contained with the filing of a complaint form, it is suggested that all FBI employees file their complaints with the FBI's Equal Employment Opportunity Officer.

The complaint must be specific and encompass only those matters discussed with me. If you retain an attorney or any other person to represent you, you and your representative must immediately notify the EEO Officer, in writing. You and/or your representative will receive a written notice of receipt of your discrimination complaint. Regarding your contacts with your representative, ensure you comply with instructions in the Prohibited Communications form.

(Rev. 2/2003)

FBI Violation of 1973 Rehabilitation Act

History

In late June I submitted an application for a [redacted] position as advertised in announcement [redacted]. I was contacted several weeks later for an interview. On August 25, I received notification via e-mail that I had been selected for this position and that I needed to submit an SF-86 and other forms to process my background information. These forms were submitted as requested.

On October 12, I had an interview at the FBI office at 7799 Leesburg Pike, Falls Church, Virginia by Agent [redacted] to discuss my SF-86 application for a clearance. This was a normal interview to discuss my SF-86 and Agent [redacted] was polite and professional the entire time. We discussed among other items, my previous medical history [redacted]

b6

[redacted] I was also given a drug test and fingerprinted as part of this meeting.

On October 24 from approximately 9:30am until 11:20am I was administered a Polygraph examination as part of the FBI pre-employment activity.

The test took place at the FBI office in Suite 200, 7799 Leesburg Pike, Falls Church, Virginia and was administered by Agent [redacted] who indicated he had been with the FBI for a total of [redacted] years and conducting Polygraph examinations for the previous [redacted] years.

b6

Agent [redacted] was courteous, professional and went over the questions he would be asking me during the Polygraph examination. Before the actual Polygraph, Agent [redacted] asked me about my medical history and I gave him the same information that was on my SF-86 and previously given to Agent [redacted]. Before the Polygraph examination I voluntarily signed a document consenting to the Polygraph examination. Agent [redacted] then started the examination by asking me a set of questions about foreign influences.

b6

I remember that Agent [redacted] seemed slightly upset after the first set of questions about [redacted] because he was mumbling something in an exasperated tone. During the second set of questions about drug usage, my fingers were turning cold from the pressure cuff, and when there was a break in the questioning, I started rubbing my forearm to help the circulation in my arm. Agent [redacted] must have noticed that I was rubbing with my arm, because he asked me if I was alright, I said "yes, but my arm is falling asleep". Agent [redacted] did not say anything but proceeded with the second repetition of the drug usage questions.

b6
b7E

After the second repetition of the drug usage questions, Agent [redacted] turned off the machine and told me I had "failed". I said to Agent [redacted] that I had told the truth and could not explain why I would have "failed". Agent [redacted] said that the Polygraph indicated I was hiding something and it would be better to admit to a problem then to "fail" the Polygraph. I said to Agent [redacted] that I would like to help him, but I had told the truth, and I could think of no rational reason why the Polygraph would indicate that I "failed". Agent [redacted] then explained he would report the test as "failed" and he was certain it would be certified as such. I would therefore be disqualified from any further consideration for this position or any future employment with the FBI.

After I recovered from the emotional shock of being accused of deception, I immediately started to investigate why the Polygraph results were incorrect. I tried to contact both Agents [redacted] and [redacted] to discuss if the trouble with my arm may have affected the results; however neither returned my phone calls.

b6

I had explained to Agent [redacted] during my SF-86 interview on October 12, one of the attractive attributes of my current position [redacted] was that I helped defend my country. I viewed the FBI position as an opportunity to more directly employ my talents and experience in the fight against Terrorism.

[redacted] I knew deception in my application would not be tolerated and my entire background would be checked. Under these circumstances, it would have been much easier to simply continue at my current job, rather than risk my career by attempting to deceive the FBI.

After investigating the Polygraph examination and my medical history, I initiated an EEO complaint of discrimination. I have recorded below the results of my investigation as background for the EEO complaint.

The Polygraph Results conflict with fact

I believe the Polygraph results indicating deception conflict with the following:

- I had cooperated with every request from the FBI and had not attempted to evade/avoid the Polygraph examination.
- [redacted]
- My FBI application was extremely detailed and complete, [redacted] Agent [redacted] remarked on my candor in providing so much detail rather than attempting to gloss over or hide my past mistakes.
- I had already passed a drug test as part of my interview on October 12.
- I had already submitted my fingerprints as part of my interview on October 12.
- I have now initiated an EEO complaint, which will draw intense scrutiny to this situation and to my past. This would be acting against my own interests if I was trying to hide a portion of my past from inspection.

b6

This was my first Polygraph and I Trusted the FBI

The FBI website states:

"Except where otherwise provided by law, there will be no discrimination because of color, race, religion, national origin, political affiliation, marital status, disability, age, sex, sexual orientation, membership or non-membership in an employee organization, or on the basis of personal favoritism"

"The FBI welcomes and encourages applications from persons with physical and mental disabilities and will reasonably accommodate the needs of those persons. The Bureau is firmly committed to satisfying its affirmative obligations under the Rehabilitation Act of 1973, to ensure that persons with disabilities have every opportunity to be hired and advanced on the basis of merit within the Department of Justice"

Having no previous experience with this kind of test, I had no reason to doubt my ability to pass it. I was determined to tell the truth. My medication allows me to perform my job, and physiological side-effects have not previously caused any job related problems.

The FBI was already aware of my mental disability through the SF86¹ and the interviews with both agents. The FBI has extensive experience with the Polygraph and should have been vigilant to utilize the Polygraph in a responsible manner².

The OPM website states as follows:

"Section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. Section 791), prohibits discrimination on the basis of disability in Federal employment and requires the Federal Government to engage in affirmative action for people with disabilities. The law:

**** Requires Federal employers not to discriminate against qualified job applicants or employees with disabilities. ...Federal employers should ensure that their policies do not unnecessarily exclude or limit persons with disabilities because of a job's structure or because of ... procedural, or attitudinal barriers.***

**** Requires employers to provide "reasonable accommodations" to applicants and employees with disabilities unless doing so would cause undue hardship to the employers.. Such accommodations may involve, for example ... adjusting or modifying examinations...***

**** Prohibits selection criteria and standards that tend to screen out people with disabilities, unless such procedures have been determined through a job analysis to be job-related and consistent with business***

necessity, and an appropriate individualized assessment indicates that the job applicant cannot perform the essential functions of the job, with or without reasonable accommodation

** Requires Federal agencies to develop affirmative action programs for hiring, placement, and advancement of persons with disabilities..."*

The FBI website states it requires³ all applicants to successfully "pass" the Polygraph examination as a condition for a complete adjudication. Therefore the ability to successfully "pass" a Polygraph becomes a requirement of the position. My disabilities and the medications I use (both correctly listed on my SF-86) put me into a disability class with a tendency to "fail" this test.^{4 5} By not allowing a full adjudication, the FBI is using "...*selection criteria and standards that tend to screen out people with disabilities...*"⁶ in violation of the Rehabilitation Act of 1973.

The United States Intelligence Community website states:

*"Each Community member is an Equal Opportunity Employer and is compliant with the provisions of the Americans with Disabilities Act. Applicants must be US citizens willing to submit to polygraph examination."*⁷

*"US citizenship is required. All applicants must successfully complete an extensive background investigation. Some positions may also require medical and psychological examinations and a polygraph interview."*⁸

Based on these statements, passing a Polygraph examination is not a general requirement for an Intelligence Community job, only the willingness to submit to a Polygraph is a requirement.

I am a Qualified Applicant

Under the Americans with Disabilities Act an individual with a disability is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities;
- Has a record of such an impairment⁹; or
- Is regarded as having such an impairment.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question. In making me a conditional offer the FBI had already evaluated, based on my resume, interview and application, that I was capable of the duties listed for this position as listed in the announcement.¹⁰

The Ability to Pass a Polygraph Examination is not a valid Suitability Requirement

The listed duties of the position¹¹ do not require the ability to successfully "pass" a Polygraph examination.

The Department of Justice website contains the following warning statement concerning the Polygraph:

*"...Though certain physiological reactions such as a fast heart beat, muscle contraction, and sweaty palms are believed to be associated with deception attempts, they do not, by themselves, indicate deceit. Anger, fear, anxiety, surprise, shame, embarrassment, and resentment can also produce these same physiological reactions."*¹²

Beyond the above, I am in a class of disabled individuals likely to be judged "deceptive" (i.e. "fail") on a Polygraph; therefore it would be discriminatory to use the Polygraph results as a determination of suitability.

The Ability to Pass a Polygraph Examination is not related to National Security

At the completion of the informal portion of the EEO process, EEO counselor [redacted] [redacted] (who was very helpful) said she had contacted the head of the FBI Polygraph unit and was told that "passing" the Polygraph examination was required because I would have to get an SCI clearance, which was required for this position. I have investigated this statement and I believe it is incorrect because of the following from DCID 6/4:

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*"The DCI exercises authority derived from statute and executive order over access eligibility to SCI and delegates this authority to Determination Authorities through Senior Officials of the Intelligence Community. ... Nothing in this directive or its annexes shall be deemed to preclude the DCI or the DDCI under the authority of the National Security Act of 1947, as amended, from taking any actions regarding an individual's SCI access."*¹³ [Sic¹⁴]

*"The granting of access to SCI will be controlled under the strictest application of the "need-to-know" principle and in accordance with the personnel security standards and procedures set forth in this directive."*¹⁵

*"Notwithstanding the status of an individual's background investigation, departments and agencies with policies sanctioning the use of the Polygraph for personnel security purposes may require Polygraph examinations when deemed necessary by the department or agency head to be in the national security interest of the United States. Where they exist, such Polygraph programs shall be characterized by unified training and certification as well as by coordination of scope, applicability and fairness issues to promote consistency, reciprocity and due process."*¹⁶

*"Polygraph (only agencies with approved personnel security Polygraph programs): in departments or agencies with policies sanctioning the use of the Polygraph for personnel security purposes, the investigation may include a Polygraph examination, conducted by a qualified Polygraph examiner."*¹⁷

Based on these statements, passing a Polygraph examination is not a requirement from the DNI for getting a SCI, but a Polygraph examination may be required as a means of collecting information. Also Polygraph programs shall be characterized by coordination of fairness issues to promote due process.

DCID 6/4 further defines the nature of the investigation for SCI as follows:

"A quality investigation is a thorough and comprehensive collection of favorable and unfavorable information from a variety of sources, past and present, that may include employment(s), reference(s), neighborhood(s), credit, police, and the Subject."

*The determination of eligibility for access to sensitive compartmented information is a discretionary determination using the whole person concept that such access is clearly in the interests of the national security. Accordingly, the investigation will be comprehensive and in such detail so as to affirmatively address unquestioned loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling and protection of sensitive compartmented information."*¹⁸

*"...The ultimate determination of whether the granting of access is clearly consistent with the interest of national security will be an overall common sense determination based on all available information."*¹⁹

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a

security clearance. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination."²⁰

*"Although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior. Notwithstanding the whole person concept, pursuit of further investigation may be terminated by an appropriate adjudicative agency in the face of reliable, significant, disqualifying, adverse information."*²¹

Because of my disabilities and the medications I use, the Polygraph examination should not be considered a source of "...*reliable, significant, disqualifying, adverse information.*"^{22 23} and FBI use of unreliable information to predict a final adjudication:

- 1) violates the "*whole person concept*" required by Presidential order.²⁴
- 2) works against the interest of National Security and undercuts the integrity of the SCI adjudication process, because it prevents an "...*overall common sense determination based on all available information.*"²⁵ and also prevents the "...*examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance...*"²⁶

Because of my disabilities and medications I am unlikely to "pass" a Polygraph, a criteria that "passing" a Polygraph is a security requirement interferes with security clearance adjudication and constitutes discrimination under the rehabilitation act of 1973; violates executive order 12968, Section 3.1(c) and Section 3.1(e); and violates the requirement of promoting due process in DCID 6/4 – Section 7.e.

The FBI's Action is Deliberate Discrimination in Violation of Rehabilitation Act of 1973

Again, as explained above, because of my disabilities and medications I am in a class more likely than average to fail this test. Therefore, I believe for the FBI to require²⁷ that I must have the ability to successfully "pass" the Polygraph examination as a condition for a complete adjudication, constitutes discrimination.

Because the FBI did not attempt to explain or resolve this complaint during the informal phase of the EEOC process, the FBI's actions should not be considered accidental, but existing policy that deliberately violates Federal Law to discriminate against specific groups of mentally disabled applicants.

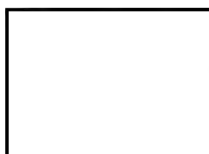
Proposed Remedy

I am therefore suggesting the following Remedy, in the belief that they will not impose undue hardship or undermine the ability of the FBI, the CIA or other intelligence agencies to protect our country.

1. The classification of my Polygraph results of October 24 as **"NO OPINION"** rendered
2. A psychiatric/psychological adjudication by **OPM** of my abilities to meet the required standards of conduct for this position including that I am "stable; trustworthy; reliable; of excellent character, judgment, and discretion; and of unquestioned loyalty to the United States". The results of the **OPM** adjudication will be made a permanent part of my FBI file.
3. The FBI will proceed with the full Background Check/Adjudication
4. The position for which I was selected will continue to be available to me based on a favorable final adjudication of suitability (including the security requirement).

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I thank you for your prompt attention to this matter.



(cell)
(work)
(home)

REFERENCES

¹ My SF-86 contained the following statements: MEDICAL – [redacted]

[redacted]

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² “In those instances when the examinee is undergoing treatment by a medical or mental health professional, coordination with the attending medical or mental health professional is essential to evaluate the examinee’s overall suitability and to obtain medical clearance to conduct PDD testing. This form of coordination is also necessary to ensure that PDD testing does not interfere with ongoing treatment efforts and to prevent PDD testing of an otherwise unsuitable examinee.

Psychological Suitability: Polygraph testing of an examinee receiving current, on-going treatment and/or prescribed medication by mental health professionals (psychiatrist, psychologist, mental health counselors or other mental health professionals) shall be discontinued or postponed until the examinee’s attending mental health professional declares the individual suitable for PDD testing. Verbal authorization from the attending mental health professional is permitted, but should be the exception and not the rule. In instances where the examinee cites mental health related illnesses associated with severe depression or other severe illnesses, written authorization from the attending mental health professional is mandatory. Any questions concerning an examinee’s psychological suitability for PDD testing must be addressed with the attending mental health professional and/or a CRC supervisor prior to PDD testing.

Physiological Suitability: Polygraph testing of an examinee being treated and/or prescribed medication by medical professionals (doctors, physician assistants, nurses, or other medical specialist) for significant injuries or illnesses shall be postponed until the examinee’s attending medical professional declares the individual suitable for PDD testing. Verbal authorization from the attending medical health professional is permitted, but should be the exception and not the rule. In instances where the examinee cites severe medical illnesses, written authorization from the attending medical professional is mandatory. Any questions concerning an examinee’s physiological suitability for PDD testing must be addressed with the attending medical professional and/or a CRC supervisor prior to PDD testing.”, FORENSIC PSYCHOPHYSIOLOGICAL DETECTION OF DECEPTION(PDD) POLICY AND PROCEDURE – MANUAL, Section 8.12 Examinee Suitability, UNITED STATES ARMY CRIMINAL INVESTIGATION COMMAND, Effective 21 February 2005

³ “Each applicant who successfully completes the initial application process to include testing and interviews will be required to successfully complete a polygraph examination in order to continue processing... Upon successful completion of the polygraph examination and drug test, applicants will be afforded a full-fledged background investigation which includes credit and criminal checks; interviews of associates; contacts with personal and business references; interviews of past and current employers and neighbors; and verification of birth, citizenship, and educational achievements. ...”
FBI Website

⁴ “...innocent neurotics and particularly psychotics were likely to be identified as deceptive. ...”
Scientific Validity of Polygraph Testing: A Research Review and Evaluation - A Technical Memorandum, U.S. Congress, Office of Technology Assessment, Washington D.C., OTA-TM-H-15, November 1983 – Chapter 6 Factors Affecting Polygraph Examination Validity - Other Psychopathology
in reference to [74. Heckel, R. V., Brokaw, J. R., Salzberg, H. C., and Wiggins, S. L., “Polygraphic Variations in Reactivity Between Delusional, Nondelusional, and Control Groups in a Crime Situation,” Journal of Criminal Law, Criminology and Police Science 53:380-383, 1962.]

⁵ letter from [redacted] – Attached

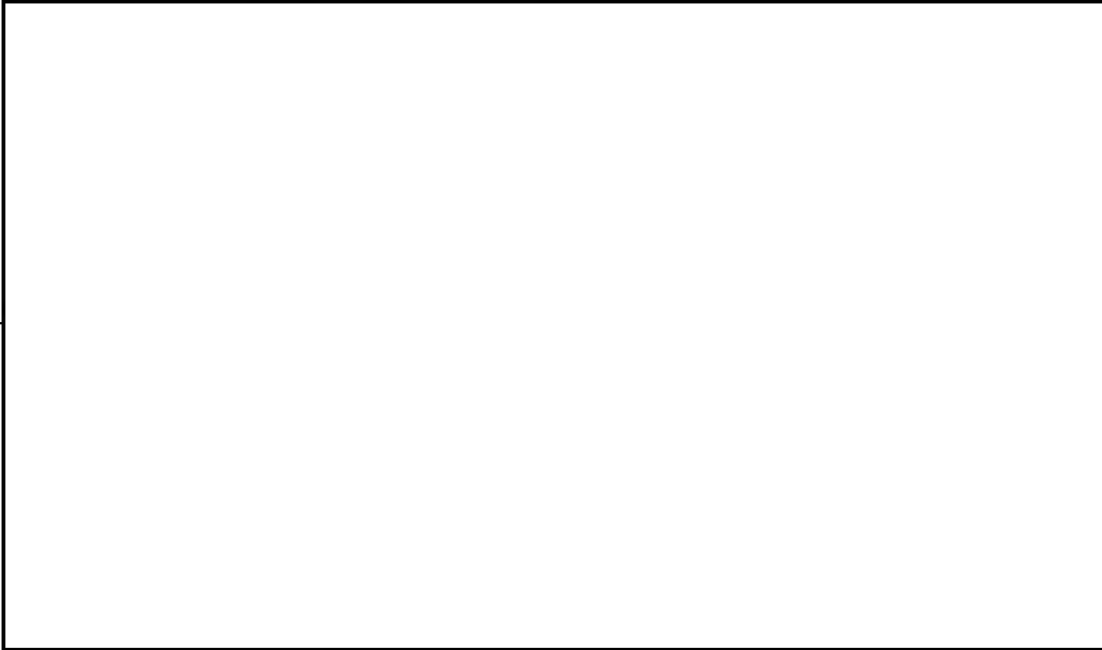
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⁶ See http://www.opm.gov/disability/hrpro_5-01.asp

⁷ See <http://www.intelligence.gov/3-whyworkic.shtml>

⁸ See http://www.intelligence.gov/3-career_infotech.shtml

⁹ Op Cit (see 1)



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¹¹ IBID

¹² United States Department of Justice Attorneys Manual, Section 9-13.300 – DOJ Website

¹³ Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information (SCI), DCID 6/4

¹⁴ Under public law 108-458, the “INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004”, the Director of National Intelligence (or DNI) now has the responsibility for the Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information

¹⁵ Op Cit (see 13) – section 4.a

¹⁶ IBID – section 7.e

¹⁷ IBID – Annex A, Section 13.o

¹⁸ IBID – Annex B, Section 2

¹⁹ IBID – Section 10

²⁰ IBID – Annex C, Section B.1

²¹ IBID – Annex C, Section B.4

²² Op Cit (see 4)

²³ Op Cit (see 5)

²⁴ Adjudicative Guidelines For Determining Eligibility for Access to Classified Information, Approved by the President March 24, 1997

²⁵ IBID – Section 10

²⁶ Op Cit (see 13) – Annex C, Section B.1

²⁷ Op Cit (see 3)

Transmission Report

Date/Time
Local ID 1
Local ID 2

11-15-2005

03:03:23 p.m.

Transmit Header Text

Local Name 1

Local Name 2

SBA 1300 3

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This document : Confirmed
(reduced sample and details below)
Document size : 8.5"x11"

November 15, 2005

ATTN: [REDACTED] FBI EEOC

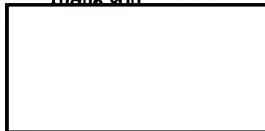
Faxed to [REDACTED] on 11/15/05

Mailed via Certified mail on 11/15/05

Attached is an EEO complaint form 201-A related to discrimination on October 24, 2005. I have included additional information that I think might be relevant.

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Thank you



CC:

Total Pages Scanned : 17

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Total Pages Confirmed : 17

No.	Job	Remote Station	Start Time	Duration	Pages	Line	Mode	Job Type	Results
001	451	[REDACTED]	02:58:42 p.m. 11-15-2005	00:03:56	17/17	1	EC	HS	CP28800

Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
CP: Completed
FA: Fail

TU: Terminated by user
TS: Terminated by system
RP: Report

G3: Group 3
EC: Error Correct

The signed statement will serve as the record necessary to initiate an investigation and will become part of the complaint file during the investigation; hearing, if any; adjudication; and appeal, if one, to the Equal Employment Opportunity Commission. 3. EFFECTS OF NON-DISCLOSURE-Submission of this information is MANDATORY. Failure to furnish this information will result in the complaint being returned without action.

FORM DOJ-201A
MAR. 2001

FBI Retaliation Complaint

History

In late June I submitted an application for a [REDACTED] as advertised in announcement [REDACTED]. I was contacted several weeks later for an interview. On August 25, 2005 I received notification via e-mail that I had been selected for this position and that I needed to submit an SF-86 and other forms to process my background information. These forms were submitted as requested.

On October 12, 2005 I had an interview at the FBI office at 7799 Leesburg Pike, Falls Church, Virginia by Special Agent [REDACTED] to discuss my SF-86 application for a clearance. This was a normal interview to discuss my SF-86 and Special Agent [REDACTED] was polite and professional the entire time. We discussed among other items, my previous medical history [REDACTED]
[REDACTED]
[REDACTED] I was also given a drug test and fingerprinted as part of this meeting.

On October 24, 2005 from approximately 9:30am until 11:20am I was administered a Polygraph examination as part of the FBI pre-employment activity. I was told at that meeting that I had not "passed" the polygraph.

After investigating the Polygraph examination and my medical history, I initiated an Equal Employment Opportunity (EEO) complaint process, which resulted in the formal complaint of discrimination filed November 16, 2005.

On November 28, 2005 the FBI security division issued a letter to me rescinding the Conditional Offer of Employment (COE) (letter attached)

The Rescinding of the COE by the FBI Security Division is Retaliatory

- 1) I have obeyed all the administrative requirements for the Equal Employment Opportunity Commission (EEOC) process
- 2) The filing of the EEOC complaint is protected activity
- 3) The FBI security division was contacted by the EEOC counselor during the informal phase of the EEOC process and was fully aware that:
 - a. EEOC activity was being initiated as a result of the discrimination
 - b. The relief being sought included a complete background check and adjudication with respect to the offered position
 - c. My employment in a position of High public trust (6C adjudication) is being endangered through the actions of the FBI
- 4) The FBI security division mocks and obstructs justice:
 - a. The security division refused to give any merit to my complaint during the informal phase
 - b. Suddenly faced with the formal complaint, the FBI security division acknowledges the merit of my original complaint ("... results of your Polygraph examination were not within acceptable parameters") and but unyielding to the superior process of the EEOC, acts without undisputed cause to eliminate any possibility for my reasonably sought and fair relief
 - c. Through the above actions the FBI security division makes a mockery of the EEOC process, at first requiring a formal complaint and then attempting to render it impotent
 - d. Through the above actions the FBI security division obstructs justice by frustrating the ability of the EEOC to provide legitimate due process:
 - i. Interfering with otherwise existing relief, prior to completion of the EEOC process
 - ii. Interfering with the EEOC's ability to investigate the original complaint in a timely manner by changing my status within the employment process so as to reduce the importance of FBI cooperation with the EEOC.
- 5) The FBI security division rescinding the COE under the pretext of normal administrative procedure is retaliatory because without due process it :
 - a. Immediately renders the original complaint moot through removing the sought relief
 - b. Immediately asserts legitimacy to the implicit accusation that I lied to the FBI as alleged by the Polygraph examiner.
 - c. Impacts my career because it prohibits me from being able to successfully compete for future FBI positions.
 - d. Immediately causes additional emotional injury to myself and my family
- 6) I am gainfully and productively employing my skills in the war on terror at my current position in support of [] Rescinding the COE endangers the adjudication required for this position. Directly against the interest of National Security, rescinding the COE hinders my ability to defend my country.

I am requesting immediate temporary relief

Because the FBI actions assert the FBI's processes are superior to those of the EEOC and the Constitution and these actions inflict immediate and irreparable harm to both my complaint and the legitimate EEOC process, I am asking the EEOC to obtain a temporary injunction restraining the FBI from withdrawal of the COE until after the conclusion of the EEOC processes

Thank you,

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U.S. Department of Justice
Federal Bureau of Investigation
Washington, D.C. 20535

11/28/2005



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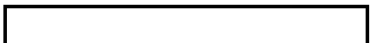
Dear 

This is to advise you that our conditional offer of appointment dated 09/14/2005, is hereby rescinded.

Although your desire to become affiliated with this Bureau is appreciated, we are unable to further process your application, based on the results of your polygraph examination on 10/24/2005. As you are aware, all applicants for FBI employment must successfully pass a pre-employment polygraph examination. The results of your polygraph examination were not within acceptable parameters.

I know that this decision will be disappointing to you, but trust that you understand the FBI's position in this matter.

Sincerely yours,

 Chief
Support Applicant Processing Unit
Security Division

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Processing field office: WF




U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

NOV 22 2005

CERTIFIED



RE: [REDACTED] AND
ALBERTO R. GONZALES, ATTORNEY GENERAL
U. S. DEPARTMENT OF JUSTICE
COMPLAINT OF DISCRIMINATION
FILE NUMBER: [REDACTED]
FILED: NOVEMBER 16, 2005 (FACSIMILE)

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Dear [REDACTED]

This letter acknowledges our receipt of your formal complaint of discrimination. It is among a number of other cases pending review by my staff, and you may be assured that it is being handled as expeditiously as possible. Pursuant to 29 CFR Part 1614, you will be advised by separate letter as to which bases and allegations of discrimination my office has accepted for investigation.

You should be aware that you have the right to appeal the final action on or dismissal of your complaint. You should also be aware that if the complaint is accepted for investigation, the Federal Bureau of Investigation (FBI) is required to conduct an impartial and appropriate investigation of your complaint within 180 days of the filing of the complaint, that date being May 15, 2006, unless the parties agree in writing to extend the time period. As set forth in 29 CFR § 1614.108(e), the parties may voluntarily extend the time period for not more than an additional 90 days. The FBI may unilaterally extend the time period, or any period of extension, for not more than 30 days where it must sanitize a complaint file.

NOTICE OF RIGHT TO FILE A DISCRIMINATION COMPLAINT

SUBJECT: NOTICE OF RIGHT TO FILE A DISCRIMINATION COMPLAINT

FROM: [REDACTED] **DATE:** 11/9/2005

TO: [REDACTED]
(Name of Person Counseled)

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This is to inform you that because the matter you brought to my attention has not been resolved to your satisfaction, you are now entitled to file a discrimination complaint based on race, color, religion, sex, national origin, physical or mental handicap, age, sexual orientation and/or reprisal. If you file a complaint, it must be in writing, signed, and filed, in person or by mail within 15 calendar days after receipt of this notice.

You will be provided a form (DOJ 201-A) for filing your complaint. If filed by mail, it must be done through the U.S. Post Office Department since the postmark is used to determine the date filed. The internal FBI mailing system is not acceptable. It is preferred that the complaint be filed with the Bureau's Equal Employment Opportunity Officer; however, any of the following officials are authorized to receive discrimination complaints:

Equal Employment Opportunity Officer
Federal Bureau of Investigation
Room 7901
935 Pennsylvania Avenue, Northwest
Washington, D.C. 20535-0001

Black Affairs Program Manager

or

Federal Women's Program Manager

or

Hispanic Employment Program Manager

or

Selective Placement Program Manager

(These individuals are located at the same address as listed above for the FBI's EEO Officer.)

Director
Federal Bureau of Investigation
Room 7176
935 Pennsylvania Avenue, Northwest
Washington, D.C. 20535-0001

(Rev. 2/2003)

Special Agent in Charge
Field Office
Field Office Address

Director, Equal Employment Opportunity
(Assistant Attorney General for Administration)
U.S. Department of Justice
10th & Constitution Avenue, Northwest
Washington, D.C. 20530

If you file your complaint with any of the above FBI officials (other than the EEO Officer), it will be sent to the EEO Office for processing. Also, if you choose to file your complaint with any of the other officials listed above, be sure to provide a copy of your complaint to the EEO Office to ensure prompt processing.

In addition, if you file your complaint or a copy of same with the Department of Justice (DOJ), ensure that you carefully review and comply with the instructions regarding the dissemination of complaint material as contained in the Prohibited Communications form furnished you. This is necessary since not all employees of the DOJ have top secret clearances. It should be emphasized that a complainant may not wittingly or unwittingly disclose sensitive/classified information to individuals/agencies not having the appropriate security clearance to receive such information. To avoid inadvertent disclosure of sensitive or classified information that may be contained with the filing of a complaint form, it is suggested that all FBI employees file their complaints with the FBI's Equal Employment Opportunity Officer.

The complaint must be specific and encompass only those matters discussed with me. If you retain an attorney or any other person to represent you, you and your representative must immediately notify the EEO Officer, in writing. You and/or your representative will receive a written notice of receipt of your discrimination complaint. Regarding your contacts with your representative, ensure you comply with instructions in the Prohibited Communications form.

(Rev. 2/2003)



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P. O. Box 19848
Washington, D.C. 20036

[Redacted]

Complainant,

v.

Alberto Gonzales,
Attorney General,
Department of Justice,
Agency.

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Appeal No. [Redacted]

Agency No. [Redacted]

Hearing No. [Redacted]

DECISION

Pursuant to 29 C.F.R. § 1614.405, the Commission accepts complainant's appeal from the agency's March 8, 2007 final order in the above-entitled matter. Complainant alleged that the agency discriminated against him, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* and Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 *et seq.*, on the bases of disability (alcohol-induced Schizophrenia, Adult Deficit Disorder, and depression) and in reprisal for prior protected EEO activity when on November 28, 2005, a conditional offer of employment for the [Redacted] position, vacancy announcement number [Redacted] was rescinded as a result of his failure to pass a polygraph examination.

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We must first determine whether it was appropriate for the AJ to have issued a decision without a hearing on this record. The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. *Id.* at 249. The evidence of the non-moving party

BAK
9-13-07

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SET TICKLER TO CLOSE BY 12/15/07 IF NO
REQUEST FOR RECONSIDERATION OR CIVIL ACTION FILED

SEP 13 2007

OCEOA
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must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. *Id.* at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986); *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case.

If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate. In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. *See Petty v. Department of Defense*, EEOC Appeal No. 01A24206 (July 11, 2003). Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. According to the Supreme Court, Rule 56 itself precludes summary judgment "where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition." *Anderson*, 477 U.S. at 250. In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. Cf. 29 C.F.R. § 1614.109(g)(2) (suggesting that an administrative judge could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

The courts have been clear that summary judgment is not to be used as a "trial by affidavit." *Redmand v. Warrenner*, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that when a party submits an affidavit and credibility is at issue, "there is a need for strident cross-examination and summary judgment on such evidence is improper." *Pedersen v. Department of Justice*, EEOC Request No. 05940339 (February 24, 1995).

The undisputed record shows that complainant submitted an application for the vacancy announcement and was given a conditional offer of employment from the agency. The offer of employment was conditional on complainant's successful completion of a background check and his passing of a polygraph examination. The agency requires that all applicants for permanent employment pass a polygraph examination. Complainant did not request any accommodation from the agency due to any alleged disability prior to taking the polygraph test.

Complainant's responses to "Series II" of the Polygraph examination were "indicative of deception." Series II included questions about the use and sale of illegal drugs and whether complainant had withheld any important information from his application. Immediately after Series II, the agency polygraph administrator told complainant that he had "failed" the polygraph examination and that he would be disqualified from any further consideration for the position with the agency.

On December 2, 2005, complainant sent a letter to the Assistant Director of the Cyber Division. In that letter, complainant requested that the agency waive the polygraph requirement for him. Complainant claimed that his medications and the disorders he suffered gave him "less than a normal chance of . . . being within acceptable parameters for a polygraph test." He further stated he was willing to take more polygraph examinations but that he felt they would "generate unreliable results" and only "waste the FBI's time and money." Complainant did not submit any medical documentation to support his request for a waiver. On January 24, 2006, the Chief in the Personnel Adjudications Section, of the agency's Security Division sent a letter denying complainant's request for a waiver of the polygraph examination requirement.

Even assuming that the Commission has jurisdiction over complainant's reasonable accommodation claim,¹ the AJ concluded that complainant has not established that he is "qualified" for a position with the agency. Specifically, the AJ concluded that the undisputed record supports the finding that the requirement to pass the polygraph examination is an essential requirement, necessary for national security reasons, which the agency cannot be compelled to waive. *See Department of the Navy v. Egan*, 484 U.S. 518, 529-30 (1988). Moreover, complainant concedes that no effective reasonable accommodation exists since his purported disability deprives him of the ability to provide reliable polygraph examination results.

With respect to complainant's disparate treatment claim, the undisputed record shows that the agency requires that all applicants pass a polygraph examination as a condition of employment. The undisputed record also shows that all applicants who fail the polygraph examination are precluded from employment. Moreover, the record is devoid of evidence to support a finding that complainant was treated less favorably than similarly situated applicants outside complainant's protected classes.

After a review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the Equal Employment Opportunity Commission to affirm the agency's final order, because the Administrative Judge's issuance of a decision without a hearing was appropriate and a preponderance of the record evidence does not establish that discrimination occurred.

¹ The AJ concluded that the Commission does not have the authority to review the substance of security clearance determinations or the validity of an employer's national security requirements. *See Lau v. Department of Justice*, EEOC Appeal No. 01A10538 (March 28, 2001); *Lyons v. Department of the Navy*, EEOC Request No. 05890839 (March 22, 1990) (The Commission has indicated it is precluded from reviewing the substance of security clearance decisions and the validity of the security requirement itself). However, the AJ concluded that the Commission does have jurisdiction to review the agency's requirement that all employees pass a polygraph examination and the issue of whether the complainant's polygraph examination results support the agency's decision to rescind the offer of employment.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0701)

The Commission may, in its discretion, reconsider the decision in this case if the complainant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. *See* 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. *See* 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. *See* 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0900)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

Carlton M. Hadden

Carlton M. Hadden, Director
Office of Federal Operations

SEP 7 2007

Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to the following recipients on the date below:



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Director, EEO Staff

Department of Justice (FBI)

Room 7901

935 Pennsylvania Ave., NW BLDG. JEH

Washington, DC 20535

SEP 7 2007

Date

A handwritten signature in black ink.

Equal Opportunity Assistant



U.S. Department of Justice

Complaint Adjudication Office

EEOC Number [redacted]

Agency Complaint No. [redacted]

DJ Number [redacted]

b6

950 Pennsylvania Avenue, N.W.
Patrick Henry Building, Ste. 5300
Washington, DC 20530

MAR 8 2007

DEPARTMENT OF JUSTICE FINAL ORDER

in the matter of

[redacted] v. Federal Bureau of Investigation

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Based on a review of the record in the above-referenced matter the Department of Justice accepts the Administrative Judge's decision that complainant was not discriminated against based on disability or reprisal.

Mark L. Gross
Complaint Adjudication Officer
Department of Justice



U.S. Department of Justice

Complaint Adjudication Office

EEOC Number [redacted]
Agency Complaint Number [redacted]
DJ Number [redacted]

b6

950 Pennsylvania Avenue, N.W.
Patrick Henry Building, Ste. 5300
Washington, DC 20530

MAR 8 2007

DEPARTMENT OF JUSTICE MEMORANDUM

Explaining the Final Order

in the matter of

[redacted] v. Federal Bureau of Investigation b6

Under the EEOC regulation at 29 C.F.R. 1614.110, when an Administrative Judge has issued a decision, the agency shall issue a final order notifying the complainant whether or not the agency will fully implement the Administrative Judge's decision. In this case, the Administrative Judge's decision is fully supported by the record and will be fully implemented. In explaining how the decision was reached, the Administrative Judge identified the proper issues, focused on the relevant facts and referred to the correct legal standards. The Administrative Judge's decision is sufficiently thorough and there is no need for further clarification or elaboration. For these reasons, the Department of Justice adopts the findings in the Administrative Judge's decision and enters a final order acknowledging that the Administrative Judge's decision will be fully implemented.

Mark L. Gross
Complaint Adjudication Officer

[redacted]

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Attorney
Complaint Adjudication Office

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COMPLAINT ADJUDICATION OFFICE
DEPARTMENT OF JUSTICE
FEB 5 2007

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE
1801 L Street, N.W. S. 100
Washington, D.C. 20507

[Redacted]
Complainant,

v.

Alberto Gonzales,
United States Attorney General,
United States Department of Justice,
(Federal Bureau of Investigation),
Agency.

EEOC Case. No.

[Redacted]

Agency Case No.

[Redacted]

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January 31, 2007

ORDER ENTERING JUDGMENT

For the reasons set forth in the enclosed Decision, judgment in the above-captioned matter is hereby issued for the Agency. A Notice To The Parties explaining their appeal rights is attached to the Decision. It is further ordered that the Agency **shall** provide this office with a copy of its decision in this matter.

This Office is also enclosing a copy of the hearing record and the Report of Investigation for the Agency.

It is so ORDERED.

Gerald M. Goldstein

For the Commission:

Gerald M. Goldstein
Administrative Judge
202.419-0747; Fax 202.419.0739

By U.S. Mail First Class:



Mark Gross
Complaint Adjudication Officer
U.S. Department of Justice
Civil Rights Division
Patrick Henry Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
[Hearing Record and Report of Investigation]

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By Facsimile:



UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON FIELD OFFICE
1801 L Street, N.W. S. 100
Washington, D.C. 20507

[REDACTED]
Complainant,

v.

Alberto Gonzales,
United States Attorney General,
United States Department of Justice,
(Federal Bureau of Investigation),
Agency.

EEOC Case. No.

Agency Case No.

January 31, 2007.

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DECISION

This is a Decision issued pursuant to 29 C.F.R. § 1614.109(g) (2006). On August 23, 2006, the United States Department of Justice, Federal Bureau of Investigation, ("FBI" or "Agency") submitted a Motion for Findings and Conclusions Without a Hearing in Favor of the Agency ("Motion" or "Motion for Summary Judgment"). Complainant filed an Opposition ("Opposition"), which the Agency filed a Reply thereto.¹

ISSUES ACCEPTED FOR INVESTIGATION

The allegations accepted for investigation were:

Whether the Complainant was discriminated against based on mental disability and reprisal for his EEO activity, when by letter dated November 28, 2005, a conditional offer of employment for the [REDACTED] vacancy announcement number [REDACTED] was rescinded as a result of his

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¹ Complainant's subsequent filing after the submission of the Agency's Reply will not be considered in this proceeding.

failure to pass a polygraph examination.

Report of Investigation ("ROI"), Tab. 6.

BACKGROUND AND FACTS

In late June 2005, the Complainant, [REDACTED] or "Complainant"), submitted an application for a [REDACTED] with the FBI in response to Vacancy Announcement [REDACTED] ("Vacancy Announcement"). ROI, Complaint of Discrimination, Tab 2, and Vacancy Announcement, Tab 14. The Vacancy Announcement indicated that the [REDACTED] required Top Secret and Sensitive Compartmented Information ("SCI") clearances.² ROI, Tab 14. The Vacancy Announcement stated that applicants must "consent to a complete background investigation, urinalysis, and polygraph." *Id.* In addition, the Vacancy Announcement advised disabled applicants who needed a reasonable accommodation to contact the FBI to request such an accommodation. *Id.*

Complainant submitted an application for the Vacancy Announcement and was given a conditional offer of employment from the FBI. Amended Complaint of Discrimination, ROI, Tab 2. The offer of employment was conditional on Complainant's successful completion of a background check and his passing of a polygraph examination. ROI, Tab 2; Manual of Investigative Operations and Guidelines ("MIOG") Part 1, Section 67-8.2 *et seq.*, ROI, Tab 27. The FBI requires that all applicants for permanent employment pass a polygraph examination. MIOG Part 1, Section 67-8.2.1, ROI, Tab 27.

As part of the process of obtaining a Top Secret clearance, Complainant submitted a

² Top Secret and SCI clearances are separate clearances as explained in Executive Order 12958 – Classified National Security Information, as Amended, attached to the Motion as Exhibit 1 and *Director of Central Intelligence Directive 6/4 Personnel Security Standards and Procedures Governing the Eligibility for Access to Sensitive Compartmented Information* ("DCID 6/4"), Exhibit 2, Motion. All FBI employees must have a Top Secret clearance, and only those employees exposed to SCI must also have SCI clearance.

Questionnaire for National Security Positions ("SF-86") to the FBI. SF-86, ROI, Tab 15.

Complainant indicated in the SF-86 that he had been previously diagnosed [REDACTED]

[REDACTED] *Id.* He stated

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[REDACTED] *Id.* On October 12, 2005, the FBI conducted a security interview and reviewed the SF-86 with [REDACTED] ROI, Tab 2.

On October 24, 2005, Complainant took a polygraph examination with the FBI. *Id.* Prior to the polygraph examination, Complainant signed a document, "Applicant Agreement to Interview with Polygraph" ("Polygraph Agreement"). Polygraph Agreement, ROI, Tab 20.

Complainant signed the following statement in the Polygraph Agreement:

I understand that I am being requested to undergo a polygraph examination regarding information I have provided in my application for employment or in interviews relating to my suitability for employment.

I further understand that the results of the examination, my refusal to undergo a polygraph examination, or my failure to cooperate during a polygraph examination will be considered along with the other factors in evaluating my suitability for employment.

I understand that, should deception be indicated during the course of this examination, I will not be eligible for further consideration for the position for which I am applying.

Id.

Complainant did not request any accommodation from the FBI due to any alleged disability prior to taking the polygraph test. [REDACTED] Sworn Statement, 2, ROI, Tab 11; [REDACTED] Sworn Statement, 5, ROI, Tab 9.

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During the polygraph examination, Complainant answered two series of questions – Series I and Series II. Polygraph Report, ROI, Tab 20. [REDACTED] responses during Series I

were not indicative of deception. Complainant's responses during Series II were "indicative of deception." *Id.* Series II included questions about the use and sale of illegal drugs and whether Complainant had withheld any important information from his application. Immediately after Series II, the FBI polygrapher told Complainant that he had "failed" the polygraph examination and that he would be disqualified from any further consideration for the position with the FBI. Complaint of Discrimination, ROI, Tab 2.

On October 26, 2005, at 4:04 p.m., Complainant contacted an EEO counselor from the FBI's Office of Equal Employment Opportunity Affairs ("OEEOA"). Exhibit 3 of Agency's Reply Brief. The Complainant's first contact was in the form of a letter sent via facsimile to OEEOA.

As part of the FBI's processing of Complainant's polygraph examination, the FBI's Applicant Program Manager, Polygraph Unit, Security Division, independently reviewed the results of his polygraph. [REDACTED] Sworn Statement, 2, ROI, Tab 11. This review also occurred on October 26, 2005, the same day that Complainant faxed his letter to OEEOA. ROI, Tab 20. The Applicant Program Manager agreed with the polygrapher's conclusion that Complainant's responses during Series II were indicative of deception. *Id.*

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On November 28, 2005, the FBI's Security Division sent a letter to Complainant indicating that the conditional offer of employment was rescinded because the results of his polygraph examination were not within acceptable parameters. [REDACTED] Letter, ROI, Tab 21.

On December 2, 2005, Complainant sent a letter to the Assistant Director of the Cyber Division. [REDACTED] Letter, ROI, Tab 22. [REDACTED]

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[redacted] *Id.* He stated he was willing to take more polygraph examinations but that he felt they would “generate unreliable results” and only “waste the FBI’s time and money.” *Id.* Complainant did not submit any medical documentation to support his request for a waiver. b6

On January 24, 2006, [redacted] Chief Personnel Adjudications Section, of the FBI’s Security Division sent a letter denying Complainant’s request for a waiver of the polygraph examination requirement. [redacted] Letter, ROI, Tab 23. Chief [redacted] stated that Complainant had failed to submit any medical documentation supporting his request for a waiver of the polygraph tests.

ANALYSIS

Summary judgment is appropriate if the record and the pleadings establish no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 29 C.F.R. § 1614.109(g); *See also, Murphy v. Dep’t of the Army*, EEOC Appeal No. 01A04099 (July 11, 2003) (noting that the regulation governing decisions without a hearing is modeled after Fed. R. Civ. P. 56). Only disputes over facts that might affect the outcome of the suit under governing law, and not irrelevant or unnecessary factual disputes, will preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).³ In opposing summary judgment, Complainant may not rest upon mere allegations. Fed. R. Civ. P. 56(e). Instead, Complainant “must set forth specific facts showing that there is a genuine issue” that requires a

³ There is no genuine issue of material fact if the relevant evidence in the record, taken as a whole, indicates that a reasonable fact-finder could not return a verdict for the party opposing summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1290 (D.C. Cir. 1998) (*en banc*) (adjudicator must assess all evidence in its full context to decide whether summary judgment is appropriate). For purposes of deciding the Motion for Summary Judgment, all facts are construed in the light most favorable to the nonmoving party, the Complainant.

hearing. *Id.* To establish a factual dispute, affidavits must "be made on personal knowledge, ... set[ting] forth such facts as would be admissible in evidence." *Id.* See also *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999).

In this administrative process, summary judgment may only be granted when the record is sufficiently developed to support a decision without a hearing, keeping in mind the quasi-investigative nature of these proceedings. *Petty v. Dep't of Def.*, EEOC Appeal No. 01A24206 (July 11, 2003); See also *Murphy* at 3.

JURISDICTION

The Commission does not have the authority to review the substance of security clearance determinations or the validity of an employer's national security requirements. See *Lau v. Dept. of Justice*, EEOC Appeal No. 01A10538 (March 28, 2001); *Galbreath v. Dept. of Navy*, EEOC Request No. 0548927 (November 4, 1999); *Schroeder v. Dept. of Defense*, EEOC Request No. 05930248 (April 14, 1994); *Lyons v. Dept. of Navy*, EEOC Request No. 05890839 (March 22, 1990) (The Commission has indicated it is precluded from reviewing the substance of security clearance decisions and the validity of the security requirement itself.). The Commission is also precluded from reviewing the credence and/or the pretextuality of an agency's articulated reason of a national security interest. *Lau, supra.* (A complainant who challenges the validity of an agency's national security requirements . . . fails to state a claim over which the Commission has jurisdiction.").

The Commission does not have jurisdiction to review either the Agency's requirement that all employees pass a polygraph examination or the issue of whether the Complainant's polygraph examination results support the Agency's decision to rescind the offer of employment. However, the Commission does have jurisdiction to determine whether the grant, denial, or

revocation of a security clearance was conducted in a nondiscriminatory manner. *Id.* The Commission has jurisdiction over claims that the Complainant was subjected to disparate treatment during the Agency's application of a national security requirement. *Lyons, supra.*

CLAIMS OF DISABILITY DISCRIMINATION

To establish a case of disability discrimination, Complainant must initially establish that he is a qualified individual with a disability. 29 C.F.R. § 1614.203(a)(6). A "qualified individual with a disability" is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position in question. 29 C.F.R. §§ 1614.203(6) and 1630.2. An "individual with a disability" is defined as one who: "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment." 29 C.F.R. §§ 1614.203(a)(1) and 1630.2(g). The term "major life activities" refers to such functions as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. §§ 1614.203(a)(3) and 1630.2(i).

If Complainant meets the threshold definition of a person with a disability, the next stage of inquiry is whether he is a "qualified" individual with a disability. 29 C.F.R. § 1614.203(c) (2). A qualified individual is one who can perform the essential functions of the position in question with or without reasonable accommodation. 29 C.F.R. § 1614.203(a)(6). In order for the Agency to have a duty to accommodate a disability, Complainant must show that he/she is a qualified individual with a disability. *See Toyota Motors Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 693-94 (2002); 29 C.F.R. § 1614.203(c) (2004).

If Complainant proves that he is a qualified individual with a disability, the analysis may continue along traditional Title VII lines (*see St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502

(1993)), or, if reasonable accommodation is at issue, then the Agency must demonstrate that it was not possible to accommodate the handicap without undue hardship on the operation of its program. 29 C.F.R. § 1630.9; *Carter v. Bennett*, 840 F. 2d 63, 65-66 (D.C. Cir. 1988).

POLYGRAPH EXAMINATION REQUIREMENT

The Agency requires that all applicants pass a polygraph examination. Consequently, the circumstances surrounding the polygraph examination requirement do not give rise to an inference of discrimination. See *Ward v. Dept. of Justice*, EEOC Appeal No. 01973627 (April 20, 2000) (holding that disparate treatment claim failed as a matter of law because the agency required all applicants to take and pass a polygraph examination.) Therefore, Complainant's claim that he was subjected to disparate treatment because he was required to pass a polygraph examination fails as a matter of law.

LACK OF SECOND POLYGRAPH EXAMINATION

Complainant implies that he was treated differently than the complainant in *Ward* and other applicants whom he claims were given reasonable accommodations during the polygraph process. In *Ward*, the complainant was given a second opportunity at a polygraph examination and questions were altered by the agency in an effort to accommodate the complainant's disability. In the present case, the Agency admitted that it had "changed the relevant questions for certain applicants." ROI, Tab 12, 4.

Complainant articulated his theory of disparate treatment for the first time in his Opposition. The accepted issue was whether the Agency discriminated against him when it rescinded his conditional offer of employment, not whether the Agency discriminated against him by failing to offer a second polygraph examination. ROI, Tab 3.⁴

⁴ Although this new allegation is dismissible as Complainant failed to exhaust his administrative

The Complainant's claim of disparate impact on the grounds that he was not given reasonable accommodations during the polygraph examination process fail as a matter of law because he cannot establish his *prima facie* case.

The Complainant has not established that he is "qualified" for a position with the Agency. According to 29 C.F.R. § 1614.203(a)(6), a "qualified individual with a disability" is a disabled person who, with or without reasonable accommodation, can perform the essential functions of the position in question. *Zimmerman v. National Archives*, EEOC Appeal No. 01941377 (May 18, 1995). The Agency requires that all applicants pass a polygraph examination as a condition of employment. *Ward, supra*. An applicant who fails the polygraph examination is precluded from employment. *Id.* According to the Complainant, his purported disability deprives him of the ability to provide reliable polygraph examination results. Without the ability to provide reliable polygraph examination results, the Complainant is unable to meet the necessary requirement of passing a polygraph examination.

Also, the circumstances of the Complainant's polygraph examination do not give rise to an inference of discrimination. The Complainant attempts to create an inference of discrimination by showing that he was treated differently than other allegedly similarly situated applicants.

Assuming *arguendo* that the agency in *Ward* was the FBI, there are enough differences such that the Complainant is not similarly situated to *Ward*.⁵ In *Ward*, the applicant sought employment in August 1994. Ward applied for a position as a Litigation Support Attorney, while the Complainant sought a position as Ward only required a Top

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remedies, it will be discussed *infra*.

⁵The published decision in the *Ward* case does not identify the agency within the Department of Justice to which that complainant applied for a position.

Secret clearance not an SCI clearance. Ward attributed his polygraph examination results to his inability to recall certain events due to alcohol-induced blackout periods, whereas the

Complainant attributes his polygraph examination results [REDACTED] ROI, b6

Tab 22. These differences are sufficient to conclude that the Complainant and the applicant in *Ward* were not similarly situated.

Assuming *arguendo* that the Complainant and the applicant in *Ward* are similarly situated, as explained below, there is no basis to infer discrimination in these circumstances. Ward was permitted to take a second polygraph examination after he sought EEO counseling. Ward complained of discrimination before he was permitted a second polygraph examination and that the offer of a second polygraph occurred during the informal counseling period. There is no reason to infer that Ward was given preferential treatment compared to the Complainant. As stated previously, Complainant never requested that he be given a second polygraph examination. Instead Complainant requested that the Agency waive the entire polygraph requirements, without submitting any medical evidence to support his request. ROI, Tab 22. In the absence of a request for a second polygraph, it is even more difficult to infer discrimination based upon the Agency's failure to give the Complainant one. Additionally, the Complainant stated on several occasions that the results of any polygraph examination that he might take would be unreliable. According to the Complainant, he is willing to take additional polygraph examinations but that they would "generate unreliable results and only waste the FBI's time and money." ROI, Tab 22. Based upon of these circumstance, there is no reason to infer that the Agency's failure to offer the Complainant a second polygraph examination was motivated by a discriminatory animus against the Complainant.

REASONABLE ACCOMMODATION

The accommodation that the Complainant seeks is a waiver of the requirement that he pass a polygraph examination. The Complainant's reasonable accommodation claim involves the Commission's jurisdiction with respect to the FBI's security clearance measures. In this case, the Complainant seeks to have the Commission order the Agency to eliminate a national security requirement, *i.e.*, passing a polygraph examination, which the Agency has deemed necessary to determine who will be granted access to classified information. If Complainant's request were granted, it would permit the Commission, not the FBI, to have the final say in deciding whether to repose trust in an employee who seeks access to classified information, which is contrary to existing precedent. *See Dept. of Navy v. Egan*, 484 U.S. 518, 529-30 (1988). The Commission, therefore, has no jurisdiction over the Complainant's claim seeking that specific reasonable accommodation under the Rehabilitation Act.

The Complainant argues that the Agency's polygraph examination requirement is a suitability requirement rather than a national security requirement. According to the Agency, the polygraph examination requirement is both. Assuming *arguendo* that the Complainant is correct and that the Commission has jurisdiction over the Complainant's reasonable accommodation claim, Complainant must show, *inter alia*, that he is a "qualified" individual with a disability. *Terry v. Dept. of Agriculture*, EEOC Appeal No. 01A41609 (Aug. 25, 2006) *aff'd* EEOC Request No. 052007 (Nov. 9, 2006). As stated above, the Agency requires that all applicants pass a polygraph examination as a condition of employment, and any applicant who fails the polygraph examination is precluded from employment. *Egan, supra*. The Complainant failed his polygraph examination. An essential requirement and perquisite of obtaining employment with the FBI, was passing the polygraph examination. Absent meeting one of the basic and

essential perquisites for employment with the Agency, Complainant was not qualified for a position with the Agency.

Moreover, the Complainant admitted that there is no reasonable accommodation available for his purported disability. ROI, Tab 22. The Complainant asserted that the results of any polygraph examination would be unreliable; therefore, he has requested that he be excused from passing a polygraph examination. As stated previously, passing a polygraph is an essential requirement for the position at issue in this proceeding. Because this requirement is necessary for national security reasons, the Agency cannot be compelled to waive it. *Egan, supra*. In the absence of any alternative, no accommodation exists. If no accommodation exists, then the Complainant is not a "qualified" individual. *Terry, supra*. ("Upon review of the record, we find that complainant did not show that there was an accommodation available that would have allowed her to perform the duties of [the] position. Therefore, complainant has not shown that she [is] a qualified individual with a disability.").

REPRISAL CLAIM

To establish a *prima facie* case of reprisal Complainant must demonstrate: (1) he engaged in a protected activity; (2) the Agency was aware of the protected activity; (3) he was subjected to adverse treatment by the Agency; and (4) a nexus existed between the protected activity and the adverse treatment." *Id.* "A nexus may be shown by evidence that the adverse treatment followed the protected activity within such a period of time and in such manner that a reprisal motive is inferred." *Grier, Jr. v. Dept. of Transportation*, EEOC Appeal No. 01A53088 (Aug. 7, 2006). As stated previously, the Commission does not have the authority to review the substance of the Agency's national security determination. Assuming *arguendo* that the Commission has jurisdiction over the claim for reprisal, the timing and the nature of

Complainant's disqualification for employment do not create an inference of reprisal.

The record established that the Complainant first notified the Agency of his claim of discrimination on October 26, 2005, at 4:04 P.M. Exhibit 3 of the Agency's Reply Brief. The Complainant notified the Agency via a facsimile to OEEOA. On that same day, [REDACTED] reviewed the results of the Complainant's polygraph examination and concurred with the polygrapher's conclusion that the Complainant had failed. Based upon the time of day the Agency received the Complainant's letter and that the letter was sent via facsimile to OEEOA rather than [REDACTED] or the Agency's Polygraph Unit, there is no basis to infer that [REDACTED] concurrence was motivated by reprisal. b6

The Agency's own regulations require that an applicant who fails the polygraph examination be precluded from employment with the Agency. The Complainant signed a statement that his that his conditional offer would be rescinded if he did not pass a polygraph examination. ROI, Tab 20. The rescission of the Complainant's conditional offer of employment based upon the polygraph examination results, does not reasonably give rise to an inference of discrimination. Based upon the circumstances here, including the timing and nature of the rescission of the Complainant's conditional offer of employment, Complainant's claim for reprisal fails as a matter of law.

CONCLUSION

Conclusory assertions that the Agency's intention and motivation are questionable are not enough to withstand a summary judgment motion. *Goldberg v. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1987); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985).

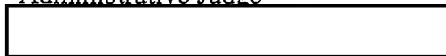
For the reasons set forth above, I conclude that Complainant has raised no genuine issues of material fact or credibility that would require a hearing. *See Barbour v. Merrill*, 48 F. 3d 1270, 1277 (D.C. Cir. 1995). Accordingly, the Agency's Motion For Summary Judgment is GRANTED.

It is so ORDERED.

Gerald M. Goldstein

For the Commission:

Gerald M. Goldstein
Administrative Judge



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NOTICE

This is a decision by an Equal Employment Opportunity Commission Administrative Judge issued pursuant to 29 C.F.R. § 1614.109(b), 109(g) or 109(I). **With the exception detailed below, the complainant may not appeal to the Commission directly from this decision.** EEOC regulations require the Agency to take final action on the complaint by issuing a final order notifying the complainant whether or not the Agency will fully implement this decision within forty (40) calendar days of receipt of the hearing file and this decision. The complainant may appeal to the Commission within thirty (30) calendar days of receipt of the Agency's final order. The complainant may file an appeal whether the Agency decides to fully implement this decision or not.

The Agency's final order shall also contain notice of the complainant's right to appeal to the Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for such appeal or lawsuit. If the final order does not fully implement this decision, the Agency must also simultaneously file an appeal to the Commission in accordance with 29 C.F.R. § 1614.403, and append a copy of the appeal to the final order. A copy of EEOC Form 573 must be attached. A copy of the final order shall also be provided by the Agency to the Administrative Judge.

If the Agency has *not* issued its final order within forty (40) calendar days of its receipt of the hearing file and this decision, the complainant may file an appeal to the Commission directly from this decision. In this event, a copy of the Administrative Judge's decision should be attached to the appeal. The complainant should furnish a copy of the appeal to the Agency at the same time it is filed with the Commission, and should certify to the Commission the date and method by which such service was made on the Agency.

All appeals to the Commission must be filed by mail, personal delivery or facsimile to the following address:

Director
Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036
Facsimile (202) 663-7022

Facsimile transmissions over 10 pages will not be accepted.

COMPLIANCE WITH AN AGENCY FINAL ACTION

An Agency's final action that has not been the subject of an appeal to the Commission or civil action is binding on the Agency. *See* 29 C.F.R. § 1614.504. If the complainant believes that the Agency has failed to comply with the terms of its final action, the complainant shall notify the Agency's EEO Director, in writing, of the alleged noncompliance within thirty (30) calendar days of when the complainant knew or should have known of the alleged noncompliance. The Agency shall resolve the matter and respond to the complainant in writing. If the complainant is not satisfied with the Agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the Agency has complied with the terms of its final action. The complainant may file such an appeal within thirty (30) calendar days of receipt of the Agency's determination or, in the event that the Agency fails to respond, at least thirty-five (35) calendar days after complainant has served the Agency with the allegations of noncompliance. A copy of the appeal must be served on the Agency, and the Agency may submit a response to the Commission within thirty (30) calendar days of receiving the notice of appeal.



Memorandum

Subject: [redacted] v. Federal Bureau of Investigation Agency Complaint No. [redacted]		Date: MAR 8 2007
To: [redacted] Unit Chief Federal Bureau of Investigation	From: [redacted] VKA Supervisory Attorney Complaint Adjudication Office	

Enclosed is the Department of Justice Final Order and Memorandum Explaining the Final Order in the above case. Under EEOC regulations, complainant has 30 days from receipt of the Order to file an appeal with the EEOC's Office of Federal Operations. If complainant files an appeal, the regulations require that you be sent a copy of the appeal. Upon receipt of any appeal, you should contact the FBI EEO Office so that the EEO Office may timely forward the case file to the EEOC's Office of Federal Operations. If you have any questions about this mailing, please contact me at [redacted]

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cc: [redacted]

U.S. Department of Justice

Complaint of Discrimination

(See instructions on reverse)

PRIVACY ACT STATEMENT: 1. AUTHORITY- The authority to collect this information is derived from 42 U.S.C. Section 2000e-16; 29 CFR Sections 1614.106 and 1614.108. 2. PURPOSE AND USE- This information will be used to document the issues and allegations of a complaint of discrimination based on race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental), sexual orientation or reprisal.

The signed statement will serve as the record necessary to initiate an investigation and will become part of the complaint file during the investigation; hearing, if any; adjudication; and appeal, if one, to the Equal Employment Opportunity Commission. 3. EFFECTS OF NON-DISCLOSURE- Submission of this information is MANDATORY. Failure to furnish this information will result in the complaint being returned without action.

1. Complainant's Full Name [Redacted]		2. Your Telephone Number (including area code) Home [Redacted] Work [Redacted]	
Street Address, RD Number, or Post Office Box Number [Redacted]			
City, State and Zip Code [Redacted]			
3. Which Department of Justice Office Do You Believe Discriminated Against You? <i>FBI.</i> <i>Albany Field Office</i>		4. Current Work Address A. Name of Agency Where You Work [Redacted] B. Street Address of Your Agency [Redacted] C. City, State and Zip Code [Redacted] D. Title and Grade of Your Job [Redacted]	
B. Street Address of Office <i>200 McCarty Ave</i>			
C. City, State and Zip Code <i>Albany, NY 12209</i>			

5. Date on Which Most Recent Alleged Discrimination Took Place

Month Day Year

JUNE 29 2010

6. Check Below Why You Believe You Were Discriminated Against?

- | | |
|---|---|
| <input type="checkbox"/> Race or Color (Give Race or Color) _____ | <input type="checkbox"/> Sexual Orientation |
| <input type="checkbox"/> Religion (Give Religion) _____ | <input type="checkbox"/> Reprisal |
| <input type="checkbox"/> Sex (Give Sex) <input type="checkbox"/> Male <input type="checkbox"/> Female | <input type="checkbox"/> Parental Status |
| <input type="checkbox"/> Sexual Harassment | <input type="checkbox"/> Class Complaint |
| <input type="checkbox"/> Age (Give age) _____ | |
| <input checked="" type="checkbox"/> National Origin (Give National Origin) _____ | |
| <input type="checkbox"/> Disability <input type="checkbox"/> Physical <input type="checkbox"/> Mental | |

7. Explain How You Believe You Were Discriminated Against (treated differently from other employees or applicants) Because of Your Race, Color, Sex (including sexual harassment), Religion, National Origin, Age, Disability (physical or mental), Sexual Orientation, Parental Status, or Reprisal. Do not include specific issues or incidents that you have not discussed with your EEO Counselor. (You may continue your answer on another sheet of paper if you need more space.)

please see attachment #1

8. What Corrective Action Do You Want Taken on Your Complaint?

Complete reevaluation of polygraph results and Examiners' Conducts by AN unbiased expert with no agenda.

9. A) I have discussed my complaint with an Equal Employment Opportunity Counselor and/or other EEO Official.

B) Name of Counselor

DATE OF FIRST CONTACT WITH EEO OFFICE:

July 27 2010

DATE OF RECEIPT OF NOTICE OF FINAL INTERVIEW WITH EEO COUNSELOR:

AUG 13 2010

☐ I Have Not Contacted an EEO Counselor

10. Date of This Complaint:

Month Day Year

Aug 23 2010

11. Sign Your Name Here:

[Redacted Signature]

Decmed filed. 8/23/10 (Postmark)

UNCL 8/27/10

FORM DOJ-201A
MAR. 2001

NOTICE OF RIGHT TO FILE A DISCRIMINATION COMPLAINT

SUBJECT: NOTICE OF RIGHT TO FILE A DISCRIMINATION COMPLAINT

FROM: EEO Counselor [REDACTED] DATE: 8/13/2010

b6

TO: [REDACTED]
(Name of Person Counseled)

This is to inform you that because the matter you brought to my attention has not been resolved to your satisfaction, you are now entitled to file a discrimination complaint based on race, color, religion, sex, national origin, physical or mental handicap, age, sexual orientation and/or reprisal. If you file a complaint, it must be in writing, signed, and filed, in person or by mail within 15 calendar days after receipt of this notice.

You will be provided a form (DOJ 201-A) for filing your complaint. If filed by mail, it must be done through the U.S. Post Office Department since the postmark is used to determine the date filed. The internal FBI mailing system is not acceptable. The complaint is to be filed with the FBI's Equal Employment Opportunity Officer at the following address:

Equal Employment Opportunity Officer
Federal Bureau of Investigation
Room 7901
935 Pennsylvania Avenue, Northwest
Washington, D.C. 20535-0001

RECEIVED
2010 AUG 25 P 2:57
OFFICE OF EEO AFFAIRS

The complaint must be specific and encompass only those matters discussed with me. If you retain an attorney or any other person to represent you, you and your representative must immediately notify the EEO Officer, in writing. You and/or your representative will receive a written notice of receipt of your discrimination complaint. Regarding your contacts with your representative, ensure you comply with instructions in the Prohibited Communications form.

Attachment No. 1

Note: Answer to question No. 7 of Form DOJ-201A (Complaint of Discrimination)

The combination of a series of events and comments has led me to believe that I am a victim of discrimination based on my national origin (Iran). I also believe that the fate of the continuation of my employment application process in Albany, N.Y. Field office was pre determined.

Job Announcement

April 6, 2010

I received an e-mail from [redacted] which stating the following.

"Thank you for visiting the Intelligence Community Virtual Career Fair on Tuesday, March 16th. The FBI currently has immediate openings and would like to review your resumes for considerations. Please submit your resume profile to the following Database no later than Friday, April 9th for consideration to our open vacancies."

b6

I did follow the instruction from the e-mail and submitted my application to the FBI database to be considered against the openings.

April 10, 2010

I noticed an ad by an FBI recruiter on-line (Federalsoup.com) by [redacted] [redacted] who was encouraging applicants with specific skills to forward their resume to him to be considered against open vacancies for [redacted] positions.

I also forwarded my resume to [redacted]

Application Process

- (JOB INTERVIEW) Thursday, April 29, 2010 at 11:00AM in Virginia (in-person interview) The job interview went very well and during the interview, the interviewer told me FBI is in need of people with language skills and regional knowledge. She also mentioned that FBI is interested to have everyone on-board by the end of September before the end of the fiscal year and time is of essence.

- (CONDITIONAL JOB OFFER) Sat, May 1, 2010 [REDACTED] I received a conditional job offer and accepted the offer on Sun, May 2, 2010 via e-mail.
- (PERSONAL SECURITY INTERVIEW (PSI)) Plattsburgh, N.Y. Tue, June 15, 2010 9:00 AM 2 hours interview regarding my SF-86 application. The Agent took copies of my current American passport [REDACTED]
[REDACTED]

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Start of concern

- (CREDIT REPORT PULL) Thursday, June 17, 2010 My credit report was pulled by Department of Justice prior to Polygraph session, possibly by Albany, N.Y. Field Office.
- Polygraph scheduled for June 22, 2010, cancelled by examiner and then rescheduled by Albany FO for June 29, 2010.
- (FIRST POLYGRAPH) June 29, 2010 11:00 AM The first Polygraph process started and lasted for a period of approximately four hours ending with this Statement from the Examiner "I would like to thank you for being truthful with me today" and proceeded to direct me to finger prints and drug test with HR assistant [REDACTED]
- The HR assistant [REDACTED] commented during the finger printing that "This is one of the longest Polygraph that we had in a long time! But it's a good sign that she sent you for finger prints and drug test. Its definitely a good sign (that you passed your Polygraph)"
- The Security Guard commented upon leaving the building "This is one of the longest Polygraph that we have had in a long time. But in my experience, I can tell you that if you have had failed, there would have been no finger prints taken and no drug test done. She [REDACTED] just would have walked you to the door"
- (2 days after the first Polygraph) on July 1, 2010 Albany FO called to schedule to retest a portion of the Polygraph.
- (SECOND POLYGRAPH) Wed, July 14, 2010 at 1:00 PM. On questioning about why the second Polygraph, examiner's response was "D.C. says, you results came back "inconclusive" your brain pattern clearly shows that you where not even thinking of the questions"

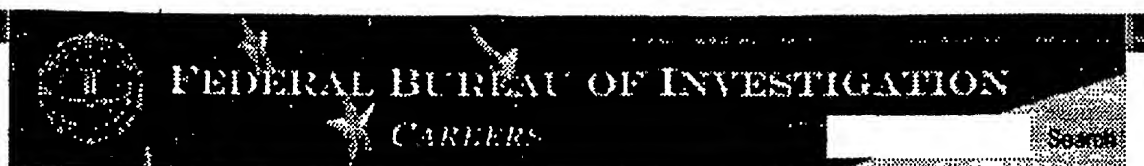
b6

- While examiner was preparing for the Polygraph session and before connecting me to the machine, the following accusations were made:
 - [] said) Your counter measures are not going to help you today!
(I said) What counter measures?? I do not know even what they are!
[] said) The ones that you have been reading since the last time!
 - [] said) ... Yes, if you wanted to hurt this country, you would have done it by now. Then again (long pause) good (pause) Later. (what I understood was) that (although you have not done anything to hurt this country but maybe you are good to hide yourself and after hiring by the FBI you will be hurting this country!)
 - [] said) Don't tell me this time like last time, that you are Hypoglycemic, and this time you took pain-killers (Advil) for twisting your ankle the day before! And this time you are in pain!
 - [] said) How many [] are there? Are you always so pleasant and nice? What happens when your masks falls? How many [] are we dealing with?
 - [] said) We have had people that we hired for the FBI, then after we found so many things about them!
 - [] said) Some people are good all their lives and then something happens and they "snap"!
- After the first set of questions the machine was disconnected and the following comment was made "you clearly reacted to one question 3 times!"
- After an hour and half with two pages of notes and answering questions, after questions, I was told session was over.
- 2 days later on July 16, 2010 Albany FO sent an unsigned letter, stating no further processing would be done on my employment application.
- HR advised me to contact EEO

Contacted FBI, EEO for assistance in understanding of, why the apparent focus of the Albany FO was to find any key factors, such as pulling my credit report before Polygraph session, to make a quick and simple rejection without the need of the Polygraph process.

After given the impression that Polygraph was a positive step with a follow-up with finger prints and drug test, it was obvious that a second Polygraph may change the result which could be used to finally make a rejection.

When the Polygraph examiner, questions who you are and suggesting you were looking for the job to be in a position to hurt this country, it is clear in my mind that this person has a personal agenda which should not be tolerated in any viable organization. The specific details of this sequence of events are available upon request.



FBIjobs Home
FBI.gov
View Jobs & Apply
- How to Apply

Career Paths
- Special Agents
- Professional Staff

Recruiting Events

Student Center
- College Recruiting
- Internship Programs
- Other Career Opportunities

Life @ FBI
- Who We Are
- Meet Our People
- Benefits at the FBI

Diversity
- Statistics
- Diversity Programs
- Testimonials

Background Investigation
- Disqualifiers
- Drug Policy
- Process
- Forms

Find Out More
- FAQ's
- Find Your Local Field Office
- FBI Reserve Service
- Featured Commercials

BACKGROUND INVESTIGATION

All FBI employees require clearance

FBIjobs.gov > Background Investigation > FBI Background Investigation Process

BACKGROUND INVESTIGATION PROCESS

One of many examples

After you receive a conditional FBI offer of employment, the next step is to begin the background investigation process. All candidates must receive an FBI Top Secret Clearance before they can begin employment with the FBI. Once you have been instructed to do so, you will initiate the FBI background investigation process by completing the appropriate FBI Background Investigation Forms.



As soon as the FBI receives a fully complete set of background investigation forms (your Human Resources point-of-contact will provide you with an address), the FBI will commence with your background investigation. You will be contacted by the FBI office that is processing your background to schedule your interview, drug test, and polygraph examination. The polygraph will check the truthfulness of all of your responses on the FBI Background Investigation Forms. In the next phase of the process, the FBI will perform extensive records checks (e.g., credit checks, police records checks, etc.), and FBI investigators will interview current and former colleagues, neighbors, friends, professors, etc.

Please note that because of the thoroughness of the background investigation process, it can take several months or more to receive your FBI Top Secret Security Clearance.

[Accessibility](#) | [Privacy Policy](#) | [Site Map](#) | [Equal Opportunity](#) | [DOJ](#) | [DNI](#)
FBIjobs.gov is an official site of the U.S. Federal Government, U.S. Department of Justice



U.S. Department of Justice
Complaint Adjudication Office

Agency Complaint No. [redacted]
DJ Number [redacted]

RECEIVED

2012 APR 17 A 8:31

OFFICE OF EEO AFFAIRS
601 D Street, NW
Patrick Henry Building, Room A4810
Washington, DC 20530

MAR 28 2012

b6

Dear [redacted]

This is in reference to the complaint of discrimination that you filed against the Federal Bureau of Investigation. Under the Department of Justice's equal employment opportunity regulations, the Complaint Adjudication Officer renders the final Department of Justice decision on such complaints. Enclosed is the final Department of Justice decision.

Rights of Appeal

First, you have the right to appeal any part of this decision to the Equal Employment Opportunity Commission (EEOC). You may do so by filing your appeal within 30 days of the date you receive this decision. If you are represented by an attorney of record, the 30-day appeal period shall begin to run the day your attorney receives this decision. The appeal must be in writing. The Commission prefers that you use EEOC Form 573, Notice of Appeal/Petition, a copy of which is attached, to appeal this decision. The notice of appeal should be sent to the Director, Office of Federal Operations, EEOC, Post Office Box 77960, Washington, D.C. 20013, by mail, personal delivery, or facsimile. You must also send a copy of your notice of appeal to [redacted] Acting EEO Officer, Federal Bureau of Investigation, 935 Pennsylvania Avenue, NW, Room 7901, Washington, DC 20535, (202) 324-4128. You must state the date and method by which you sent the copy of your notice to the agency's EEO Director either on, or attached to, the notice of appeal you mail to the EEOC.

Second, you have the right to file a civil action in the appropriate United States District Court within 90 days of the date you receive this decision. In filing your federal complaint, you should name the Attorney General, Eric Holder Jr., as the defendant. Even if you appeal this decision to the EEOC, you still have the right to go to federal court. You may file a civil action in the United States District Court within

APPEAL OR CIVIC ACTION FILED
7/6/2012
IF NO

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90 days of the day you receive the Commission's final decision on your appeal, or after 180 days from the date you filed your appeal with the Commission, if the Commission has not made a final decision by that time.

If you cannot afford to file a civil action, you can ask the court to allow you to file the action at no cost to you. The court may also provide you with an attorney if you cannot afford to hire one to represent you in your civil action. Questions concerning when and how to file a waiver of costs should be directed to your attorney or the District Court clerk.

Sincerely,



Mark L. Gross
Complaint Adjudication Officer

cc:



b6



U.S. Department of Justice
Complaint Adjudication Office

Agency Complaint No. [REDACTED]
DJ Number [REDACTED]

b6

MAR 28 2012

601 D Street, NW
Patrick Henry Building, Room A4810
Washington, DC 20530

DEPARTMENT OF JUSTICE FINAL DECISION

in the case of

[REDACTED] v. Federal Bureau of Investigation

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On August 23, 2010, complainant [REDACTED] an applicant for a position [REDACTED], filed an employment discrimination complaint against the Federal Bureau of Investigation (FBI). Complainant claimed he was discriminated against based on his national origin (Iranian) when on July 16, 2010, he was notified that there would be no further processing of his employment application. As relief, complainant seeks a complete reevaluation of his polygraph examination and/or an examination by an unbiased polygraph examiner.

Factual Background

1. Complainant's allegations

Complainant said that he applied for the [REDACTED] position via an FBI employment database. Complainant interviewed for the position on April 29, 2010, in Virginia. Complainant said that the interviewer informed him that the FBI needed individuals with foreign language skills and regional knowledge. Complainant also said that the interviewer "informed [him] that the FBI may not hire individuals from Iran" (Ex. 9 at 2).¹

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Complainant received a conditional offer of employment on May 1, 2010, "which was contingent upon results of a background investigation. Complainant accepted the conditional offer the next day". (*id.* at 2-3). On June 15, 2010, an FBI Special Agent from the Pittsburgh office conducted a two-hour personal security interview based on complainant's application. Complainant said that on June 29, 2010, Special Agent [REDACTED] Albany Division,

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¹ "Ex. __ at __" refers to exhibits in the record of investigation and their corresponding page number(s).

administered his polygraph examination. Complainant said that he "recall[ed] [redacted] asked [him] a lot of questions" (id. at 3). Complainant said that he "[felt] like he was already under suspicion and was required to defend [himself]" (ibid). Complainant said that the polygraph examination "lasted approximately three and a half hours" (ibid). Complainant said that after the examination concluded, [redacted] [thanked] him for being truthful and directed [him] to get [his] fingerprints and drug test completed" (id. at 3-4). Complainant said that because of the duration of the examination [redacted] he felt "light headed" after the examination (id. at 4).

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Complainant said that the Albany Division contacted him on July 1, 2010, and told him that he would have to take a second polygraph examination on July 14, 2010. Complainant said that [redacted] also administered the second polygraph examination" (id. at 4). Complainant said that [redacted] told him that in reviewing the first examination, "FBI Headquarters determined that the results were inconclusive and noted that [complainant's] brain pattern showed signs that [complainant] was not thinking of the questions" (ibid). Complainant said that [redacted] told him before beginning the second examination that "countermeasures would not help [him]" (ibid). Complainant said that [redacted] also told him "not to state that [he] was [redacted] as he had done during the previous examination" (ibid). Complainant said that [redacted] implied that [complainant] could be a mole who would harm this country after [he] was hired" (ibid). Complainant said that he "believe[d] [redacted] set the stage for failure even before she began the second polygraph examination" (id. at 4-5).

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Complainant recalled that he was asked "six or seven questions all dealing with National Security, and then the session was ended" (id. at 5). Complainant said that after the examination ended, [redacted] informed [complainant] that [he] clearly showed deception on the question 'Have you ever been a member of a terrorist group?'" (ibid). Complainant said that he answered, "No" (ibid). Complainant added that he also explained to [redacted] that [redacted]

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[redacted] (ibid). Complainant said that he had "never been a member of any groups" (ibid). Complainant said that [redacted]

[redacted] (ibid). Complainant said that his knowledge that this group [redacted] "may have caused an abnormal reaction with simply 'yes' or 'no' answers" (ibid). Complainant said that he "responded 'No' because at that time, [redacted]

[redacted] nor was [complainant] ever a member" (ibid). Complainant said that he spent "the next two hours discussing the above point with [redacted] (ibid). Complainant said that "it was during this discussion that [redacted] indicated the purpose of that line of questions was to clarify the reasons for any abnormal readings indicated in polygraph results for her management" (ibid). Complainant said that he "further under[stood] that the [redacted]

[redacted] and [complainant has] never had any affiliation with this group" (id. at 6).

Complainant received a letter from the Albany Division on July 16, 2010, informing him that his application would not be processed further. Complainant said that on July 22, 2010, he sent a letter to Polygraph Unit Chief [redacted] requesting that his polygraph results be reevaluated. Complainant said that Albany Division Section Chief [redacted] sent him a letter on October 18, 2010, stating that complainant's request for a reevaluation of his polygraph results had been rejected, and there was no further recourse.

Complainant said that he believed that his "integrity as a U.S. citizen is being questioned based on a personal agenda and not facts" (ibid). Countering [redacted] alleged comment implying that complainant may be a "mole" [redacted] and this "was not mentioned in any document" (ibid).

2. FBI Witnesses

Polygraph Unit Chief [redacted] explained that complainant was administered a full-scope polygraph examination consisting of two separate areas of testing: national security matters and suitability/lifestyle issues. [redacted] said that "the relevant questions on the applicant polygraph examination are the same for all candidates" (ibid). [redacted] explained that "polygraph examinations are based on the concept that when an

individual tells a lie, it creates stress [that] manifests itself in physiological changes which cannot be controlled" (id. at 3).

[] said that the "polygraph instrument monitors and charts changes in heart rate and blood pressure, respiration, and perspiration, [and that] polygraph examiners study and evaluate the physiological changes from homeostasis (baseline)" (ibid). b6

[] said that after complainant's first polygraph examination, Special Agent [] "assessed the results as No Deception Indicated (NDI)" (ibid). [] said that [] then submitted the results and her conclusion to Regional Polygraph Program Manager Supervisory Special Agent [] for "quality control (QC) review" (ibid). [] said that FBI "security practices dictate that a blind QC is conducted of all polygraph examinations to ensure accuracy and defensibility of the results" (ibid). [] said that the QC involved conducting an independent analysis and assessment of the results "before seeing the examiner's conclusions" (ibid). [] added that the "Regional Polygraph Program Manager does not have any knowledge of the examinee's protected class status, including national origin information" (id. at 3-4). [] said that with respect to the QC review of complainant's polygraph examination, [] assessed the results as inconclusive and subsequently reversed [] NDI call" (id. at 4). [] said that he subsequently reviewed the documentation associated with complainant's first polygraph examination, and [] agreed with [] assessment that the results were inconclusive. b6

[] said that "all FBI applicants whose polygraph results are inconclusive are automatically rescheduled for retesting" (id. at 4). [] said the results of complainant's second polygraph examination "were indicative of deception with timely, clear responses to the terrorism question" (ibid). [] said that during the post-test discussion, complainant "provided additional information, previously unknown, which [was] clearly relevant to the topic of terrorism support and corroborated the deceptive test results" (ibid). [] said that [] documented the additional information in the polygraph report" (ibid). [] said that [] also concluded that the results of complainant's second polygraph examination indicated deception. b6 [] noted that part of the QC review process involved reviewing the pre-/post- test interview summaries "in order to determine a possible reason for the test result" (Ex. 10A at 3). [] said that he reviewed all the relevant documents and

agreed with [] and [] that the test results indicated deception.

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[] said that on July 16, 2010, the FBI sent complainant a computer-generated letter notifying him that it would not process further his employment application. [] said that complainant sent a letter objecting to the polygraph results and requesting a reevaluation. [] said that "upon review of the letter and all relevant documents, [complainant's] case did not warrant reevaluation and was subsequently denied" (id. at 5).

[] said that "the Deception Indicated conclusion reached on [complainant's] polygraph examination was based solely on the technical analysis of his physiological reactions to the questions presented" (Ex. 10 at 6). [] also noted that "based on the failed polygraph examination and in accordance with FBI corporate policy, ...further processing of [complainant's] employment application was strictly prohibited" (ibid.). [] "firmly den[ied] that [complainant's] national origin had any bearing on the decision that there would be no further processing of his employment application" (ibid.).

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Special Agent [] said that there were three phases to FBI polygraph examinations: 1) pre-test, 2) test, and 3) post-test. [] recalled that during the pre-test phase for the polygraph she administered to complainant on June 29, 2010, she discussed with complainant "national security and suitability issues including prior drug usage, involvement in serious crime, and terrorism" (Ex. 11 at 3). [] said that "with regard to the terrorism question... [complainant] responded that in his youth he

b6

[] (ibid.).

[] said that during the actual polygraph portion of the examination, she "believed [complainant's] responses were forthright and [she] had no cause for concern" (ibid.). [] said that during the post-test phase, complainant "elaborated on the issues that had been previously discussed" (ibid.). [] said that she "believe[d] that [complainant] is a social talker with whom [she] had established good rapport" (ibid.). [] said that complainant told her

b6

[] (ibid.). [] said that "the entire examination lasted approximately two and a half hours, which is within the standard

time frame for polygraph examinations" (ibid). [] did "not recall any unusual circumstances occurring during any phase of the examination process" (ibid). b6

[] said that her initial assessment of the polygraph examination was that complainant had passed it and that "to minimize additional travel," she referred complainant "to the next step in the pre-employment screening process" (id. at 4).

[] said that she then submitted the polygraph results to the Polygraph Unit for a QC review as was the standard operating procedure. [] said that the QC polygraph expert and supervisor deemed complainant's polygraph results to be inconclusive, and complainant was offered a second polygraph examination. [] said that "most applicants are concerned or disappointed when they receive inconclusive results on a polygraph examination" (ibid). b6

[] said that "some individuals have been known to obtain information from publically available sources regarding certain countermeasures that can be used to defeat polygraph examinations" (ibid). [] said that "in order to address this issue, ...examinees are provided a standard warning against the use of countermeasures during the test" (ibid). [] said that she gave complainant this warning to complainant before both examinations. [] said that she "did not accuse... [] or imply that there was a possibility of [complainant] being a mole who could harm this country once he was hired" (id. at 5).

[] said that the second polygraph examination "focused on national security and suitability issues" (ibid). [] said that during the polygraph phase of the second examination, complainant "displayed a strong reaction to the terrorism question" (ibid). [] said that "based on [complainant's] reaction," she concluded that complainant "failed the second polygraph examination" (ibid). b6

[] said that during the post-test phase, complainant "elaborated on the terrorism issue and his reaction" (ibid).

[] said that complainant "explained that in his youth, []" (ibid). [] said that

complainant. [] b6

(ibid). [] said that complainant also explained that after the

[] (ibid). [] said that complainant said that he

(ibid). [] said that "the information [complainant] provided during the post-test phase did not alter the overall assessment" (ibid). b6

[] said that she forwarded the results of the second polygraph examination to the Polygraph Unit for a QC review. [] said that her assessment that complainant had failed the examination were upheld. [] said that "the outcome of the polygraph examination was based solely on [complainant's] reaction to the questions posed him" (id. at 6). [] said that as a result, complainant's application for employment was not processed further.

[] added that on April 25, 2010, she conducted a polygraph examination for another applicant of Iranian national origin. [] said that she determined that this applicant passed the polygraph examination, and her assessment was subsequently confirmed by the QC review. b6

Polygraph Unit Regional Program Manager [] said that he conducted a "blind review" of complainant's polygraph examination as he does for all QC reviews, meaning that he did not know the results of the initial assessor before conducting his review (Ex. 12 at 3). [] said that after conducting the QC review, his assessment was that complainant's polygraph was inconclusive, which was different from [] conclusion of NDI. [] said that based on this discrepancy, he "requested a second opinion from SSA [] a Polygraph Examiner at FBI Headquarters" (id. at 4). [] said that [] confirmed his assessment, and the final determination was that complainant's polygraph examination was inconclusive. b6

[] said that he also performed a QC review of complainant's second polygraph examination and compared the results with [] assessment. [] said that "this time our results were consistent with both of us assessing the call as 'indicative of deception' with timely, clear responses to the relevant issues on the exam" (id. at 5). [] said that in "the post-test discussion with [] [complainant] made admissions and provided more detail on his reaction to the relevant questions" (ibid). [] said that he "believe[d] [complainant's] admissions explain his reaction to these questions" (ibid). b6

[redacted] said that "the conclusions ...reached during [his] QC reviews [were] based solely on a technical analysis of [complainant's] reactions to the questions posed to him" (id. at 6). [redacted] also noted that "at no time was [complainant's] protected class status, to include his national origin, considered during [redacted] QC review of [complainant's] polygraph examinations" (ibid).

b6

Professional Support Clearance Unit Chief [redacted] said that "on average, approximately twenty-five percent of applicants are disqualified based on the results of their polygraph examination, almost all due to Deception Indicated" (Ex. 13 at 5).

Analysis

Complainant claimed that he was discriminated against based on his national origin when the FBI advised him that his application for employment with the Bureau would not be processed further. Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16, prohibits a federal employer from discriminating against employees based on national origin.

As part of the hiring process, the FBI requires potential employees to take and pass a polygraph examination. In this case, the Special Agent [redacted] administered a polygraph examination to complainant, and [redacted] initially assessed that complainant had passed the examination. Upon further review, which was in accordance with established FBI procedures and policies, Polygraph Unit Regional Program Manager [redacted] concluded that the results of complainant's polygraph examination were inconclusive as opposed to not indicating deception.

b6

The FBI offered, and complainant accepted, an opportunity to take another polygraph examination. [redacted] testified that during this examination, complainant's response to a question relating to terrorism indicated deception. Both [redacted] and complainant acknowledged that there was some discussion during the post-test phase of the second polygraph examination about complainant's

b6

[redacted]
[redacted] While

[redacted]
[redacted]

their testimonies regarding this discussion differed considerably, [] testified that the information complainant provided during the post-test discussion did not alter her overall assessment that complainant's response to the terrorism question indicated deception. [] testified that he agreed with [] assessment that complainant's responses indicated deception during the second polygraph. Polygraph Unit Chief [] reviewed both [] and [] assessments of complainant's second polygraph and agreed with their conclusions of Deception Indicated. [] [] and [] denied that complainant's national origin played any role in their conclusions about his polygraph examination. They each testified that the Deception Indicated conclusion reached on complainant's polygraph examination was based solely on the technical analysis of his physiological reactions to the questions presented. [] testified that FBI policy prohibited the Bureau from continuing to process complainant's application once complainant failed the polygraph examination.

b6

The record did not contain any evidence other than complainant's own testimony to support complainant's allegations that he was discriminated against based on his national origin. Complainant complained that Special Agent [] implied that he could be a "mole" working to harm the United States. [] denied ever making or implying any such thing, and the record did not contain any supporting evidence that she had done so. The record evidence established that the FBI determined that complainant's responses during a portion of the required pre-employment polygraph examination indicated deception. Specifically, complainant's responses to a question or questions relating to the issue of terrorism were deemed indicative of deception. FBI policy states that "a lack of candor displayed by an applicant during ANY PHASE OF THEIR processing warrants their disqualification" (emphasis in original) (Ex. 30, Manual of Investigative Operations and Guidelines, Section 67-82.1(4)).

b6

From the FBI's perspective, complainant's polygraph examination indicated that complainant was deceptive about the terrorism issue. The FBI concluded that complainant was being less than candid and truthful. As noted above, the FBI's internal guidelines provide for disqualification of applicants who display a lack of candor. The record evidence failed to show any irregularities with respect to how the FBI handled complainant's polygraph examinations or its decision to rescind its conditional

offer of employment. The FBI's actions in this case did not raise any inference of discrimination. The record contained no evidence of discriminatory animus based on complainant's national origin on the part of any FBI officials involved in either the administration of the polygraph examinations, the analysis of the results of those examinations, or the decision to rescind the conditional offer of employment. Finally, the record did not contain any evidence to suggest that the legitimate, nondiscriminatory reasons FBI officials proffered for their actions in this case were pretext for illegal discrimination.

Decision

For the foregoing reasons, the record evidence fails to support complainant's claims that the FBI discriminated against him based on his national origin when on July 16, 2010, he was notified that there would be no further processing of his employment application. Relief is denied.



Mark L. Gross

Complaint Adjudication Officer



Attorney

Complaint Adjudication Office

b6

Complaint of Discrimination

(See instructions on reverse.)

PRIVACY ACT STATEMENT: 1. AUTHORITY: The authority to collect this information is derived from 42 U.S.C. Section 2000e-15, 29 CFR Sections 1614.104 and 1614.105. 2. PURPOSE: AND USE: This information will be used to document the history and allegations of a complaint of discrimination based on race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental), sexual orientation or reprisal.

The signed statement will serve as the record necessary to initiate an investigation and will become part of the complaint file during the investigation, hearing, if any, adjustment, and appeal. 3. EFFECTS OF NON-DISCLOSURE: Submission of this information is MANDATORY. Failure to furnish this information will result in the complaint being returned without action.

1. Complainant's Full Name: <u>[Redacted]</u>	2. Your Telephone Number (including area code): Home: <u>[Redacted]</u> Work: <u>[Redacted]</u>
3. Street Address, RFD Number, or Post Office Box Number: <u>[Redacted]</u>	
4. City, State and Zip Code: <u>[Redacted]</u>	

5. Which Department of Justice Office Do You Believe Discriminated Against You?

FBI Office, Dallas, TX

6. Street Address of Office: FBI

ONE Justice Way

7. City, State and Zip Code:

Dallas, TX 75220-5220

8. Date on Which Most Recent Alleged Discrimination Took Place:

Month: 05 Day: 11 Year: 2006

9. Check Below Why You Believe You Were Discriminated Against:

- ☒ Race or Color (Give Race or Color): Middle Eastern
☒ Religion (Give Religion): Jewish
☐ Sex (Give Sex): ☐ Male ☐ Female
☐ Sexual Harassment
☐ Age (Give age): _____
☒ National Origin (Give National Origin): Persian
☐ Disability ☐ Physical ☐ Mental

- ☐ Sexual Orientation
☐ Reprisal
☐ Parental Status
☐ Cases Complaint

10. Explain How You Believe You Were Discriminated Against (treated differently from other employees or applicants) Because of Your Race, Color, Sex (including sexual harassment, Religion, National Origin, Age, Disability (physical or mental), Sexual Orientation, Parental Status, or Reprisal. Do not include specific issues or incidents that you have not discussed with your EEO Counselor. (You may continue your answer on another sheet of paper if you need more space.)

I was discriminated based on my race, religion, and national origins. The interviewer violated Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination.

11. What Corrective Action Do You Want Taken on Your Complaint?

I would like to file official charges against the examiner and pursue an internal investigation.

12. A) Have discussed my complaint with an Equal Employment Opportunity Counselor under 29 CFR 1614.104?

DATE OF FIRST CONTACT WITH EEO OFFICE:

08 17 06

DATE OF RECEIPT OF NOTICE OF FINAL INTERVIEW WITH EEO COUNSELOR:

08 25 06

Have Not
Consulted an
EEO Counselor

13. Date of This Complaint:

Month: 08 Day: 31 Year: 06

14. Sign Your Name:

[Redacted Signature]

Deemed filed 9/11/06 (Postmark)

FORM DOJ-201A
MAR 2001

ALL FBI INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED

DATE 10/6/06 BY 60322/uc/47 CLK/edc
CDRU # 01-001

W

Continuation on questions 7

I am an applicant for a [redacted] I was discriminated based on my race, religion and national origin. The interviewer asked if I was raised in Hebrew faith and I am Jewish when I said yes, as a result he was discriminatory against me. First he is not supposed to be asked about my religion since I did not volunteer the information. Secondly I am not subject to discrimination and disrespect based on where I was born, my ethnic background and my religion.

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I believe that interviewer has a track record of discriminating against minority groups. I would like an internal investigation to take place against this individual and official charges to be filed against him. I would like to be given a fair chance to continue with my employment. Regardless I would continue with my complaint against the interviewer because I believe that if I don't, he will continue his discriminatory practices against other minority applicants.

It is a shame that this individual abused the power and authority given to him by the federal government and discriminates based on the race, religion, and national origin. He violated the Title VII of civil rights acts which prohibits employment discrimination based on the race, religion, and national origin.

b6

[redacted]
08131106



U.S. Department of Justice
Complaint Adjudication Office

RECEIVED

Agency Complaint Number [redacted]
DJ Number [redacted]

2010 FEB 19 P 4 2

b6

OFFICE OF EEO AFFAIRS
Patrick Henry Building, Suite 5300
Washington, DC 20530

FEB 18 2010

Dear [redacted]

This is in reference to the complaint of employment discrimination that you filed against the Federal Bureau of Investigation. Under the Department of Justice's equal employment opportunity regulations, the Complaint Adjudication Officer renders the final Department of Justice decision on your complaint. Enclosed is the final Department of Justice decision. Your rights of appeal are outlined below.

Rights of Appeal

First, you have the right to appeal any part of this decision to the Equal Employment Opportunity Commission (EEOC). You may do so by filing your appeal within 30 days of the date you receive this decision. If you are represented by an attorney of record, the 30-day appeal period shall begin to run the day your attorney receives this decision. The appeal must be in writing. The Commission prefers that you use EEOC Form 573, Notice of Appeal/Petition, a copy of which is attached, to appeal this decision. The notice of appeal should be sent to the Director, Office of Federal Operations, EEOC, Post Office Box 19848, Washington, D.C. 20036, by mail, personal delivery, or facsimile. You must also send a copy of your notice of appeal to [redacted] EEO Officer, Federal Bureau of Investigation, 10th and Pennsylvania Ave., NW, Room 7901, Washington, DC 20535. You must state the date and method by which you sent the copy of your notice to the agency's EEO Officer either on, or attached to, the notice of appeal you mail to the EEOC.

b6

Second, you have the right to file a civil action in the appropriate United States District Court within 90 days of the date you receive this decision. In filing your federal complaint, you should name the Attorney General, Eric H. Holder, Jr., as the defendant. Even if you appeal this decision to the EEOC, you still have the right to go to federal court. You may file a civil action in the United States District Court within 90

SET CLOCKER TO CLOSE BY 5/23/10 IF NO
APPEAL OR CIVIC ACTION FILED. (F)

b6

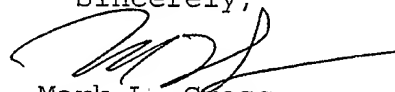
2/23/10
2/23/10



days of the day you receive the Commission's final decision on your appeal, or after 180 days from the date you filed your appeal with the Commission, if the Commission has not made a final decision by that time.

If you cannot afford to file a civil action, you can ask the court to allow you to file the action at no cost to you. The court may also provide you with an attorney if you cannot afford to hire one to represent you in your civil action. Questions concerning when and how to file a waiver of costs should be directed to your attorney or the District Court clerk.

Sincerely,



Mark L. Gross

Complaint Adjudication Officer

cc:



b6

NOTICE OF APPEAL PETITION
TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS

P O. Box 19848
 Washington, DC, 20036

Complainant Information: (Please Print or Type)

Complainant's name (Last, First, M.I.)	
Home/mailing address:	
City, State, ZIP Code:	
Daytime Telephone # (with area code):	
E-mail address (if any):	

Attorney/Representative Information (if any):

Attorney name:	
Non-Attorney Representative name:	
Address:	
City, State, ZIP Code:	
Telephone number (if applicable):	
E-mail address (if any):	

General Information:

Name of the agency being charged with discrimination:	
Identify the Agency's complaint number:	
Location of the duty station or local facility in which the complaint arose:	
Has a final action been taken by the agency, an Arbitrator, FLRA, or MSPB on this complaint?	<input type="checkbox"/> Yes Date Received _____ (Remember to attach a copy) <input type="checkbox"/> No <input type="checkbox"/> This appeal alleges a breach of a settlement agreement
Has a complaint been filed on this same matter with the EEOC, another agency, or through any other administrative or collective bargaining procedures?	<input type="checkbox"/> No <input type="checkbox"/> Yes (Indicate the agency or procedure, complaint/docket number, and attach a copy, if appropriate)
Has a civil action (lawsuit) been filed in connection with this complaint?	<input type="checkbox"/> No <input type="checkbox"/> Yes (Attach a copy of the civil action filed)

NOTICE: Please attach a copy of the final decision or order from which you are appealing. If a hearing was requested please attach a copy of the agency's final order and a copy of the EEOC Administrative Judge's decision. Any comments or brief in support of this appeal **MUST** be filed with the EEOC and with the agency within 30 days of the date this appeal is filed. The date the appeal is filed is the date on which it is postmarked, hand delivered, or mailed to the EEOC at the address above.

Signature of Complainant or
 Authorized Representative:

Date:

CC-1 (Rev. 10/95)

FEDERAL GOVERNMENT EMPLOYMENT



U.S. Department of Justice

Complaint Adjudication Office

Agency Complaint No. [redacted]

DJ Number [redacted]

b6

950 Pennsylvania Avenue, N.W.
Patrick Henry Building, Ste. 5300

DEPARTMENT OF JUSTICE FINAL DECISION

in the matter of

[redacted] v. Federal Bureau of Investigation

On September 11, 2006, complainant [redacted] filed an employment discrimination complaint against the FBI. The issue the FBI accepted for investigation was whether complainant was discriminated against based on his race (white), national origin (Iranian), and religion (Jewish) when, on July 31, 2006, he learned that he was denied an opportunity to take a second polygraph examination. As relief, complainant requests a position [redacted] with the FBI, expedited processing of his [redacted] application, disciplinary action against [redacted] polygrapher [redacted] and second polygraphs for [redacted] applicants who have failed due to [redacted] actions. This office received this file on July 10, 2008.

b6

This case raises claims of discrimination based on race, religion, and national origin. Section 717 of Title VII of the Civil Rights Act of 1964, as amended, makes it unlawful for a federal employer to discriminate against an applicant because of that person's race, religion, or national origin. 42 U.S.C. §2000e-16.

Facts

Complainant, [redacted] took a polygraph examination as part of the application process to become an [redacted]. He failed the polygraph according to FBI standards and the FBI rescinded his conditional offer of employment. He requested a second polygraph, which request was denied. Complainant alleges that the polygraph was intentionally misapplied by [redacted] who complainant claims commented on his religion and national origin in an inappropriate way during the polygraph process.

b6

[redacted] denied making any improper comments, and insisted that he followed all FBI regulations concerning complainant's polygraph.

Other FBI officials confirmed the accuracy of the polygraph reading and that FBI policy rarely allows a second polygraph under the circumstances here. Specifically, complainant failed questions having to do with espionage. According to FBI officials, it is rare that someone who fails those questions is afforded a retest. In addition, complainant had trouble with the other questions on the test, and failed to fill out another form properly that concerned residences and foreign travel.

A. Complainant's Allegations

In December 2004, complainant applied for an [] position with the FBI through their [] Field Office. (Ex. 9, p. 2). Complainant passed Phase 1 of the application process and moved on to Phase 2, which required a polygraph. By that time, complainant had moved to [] and reported to the [] Field Office on May 11, 2006, for his polygraph. (Id.)

b6

Polygraph examiner [] came to the lobby and escorted complainant to the polygraph examination room. (Ex. 9, p. 3). After asking several background questions, including whether complainant was born in Iran, [] asked whether complainant was raised in the "Hebrew faith." (Id.) Complainant said he thought it was an inappropriate question. [] also asked complainant, in what complainant described as a "derisive" tone, when he immigrated to the United States. (Id.) [] asked several questions about intelligence agencies, including Mossad, and complainant believes [] was implying that complainant was a Mossad agent trying to infiltrate the FBI. (Ex. 9, pp. 3-4).

b6

Complainant said [] also asked complainant whether he drank. When complainant replied that he did during Christmas, [] asked why complainant would drink during Christmas if he was Jewish. (Ex. 9, p. 4).

b6

[] then began the polygraph and attached, then reattached, the equipment several times during the examination. (Id.). [] eventually removed the equipment for the last time, made a telephone call, and left complainant in the room for 15-20 minutes. When he returned, [] asked, "So you have never had any encounter with anyone in a foreign intelligence agency?" Complainant responded, "no." (Ex. 9, p. 5). [] continued to press complainant on his answers concerning foreign intelligence, and eventually [] told complainant that he did not answer the foreign intelligence questions truthfully. (Ex. 9, p. 6).

b6

In May 2006, complainant received a phone call from [] in FBI Human Resources, who told him he had failed the polygraph and needed to request a retest. Complainant did so the next day. (Id.). In May or June 2006, complainant received a letter from the FBI rescinding his conditional offer of employment. (Id.). In July 2006, he received a letter stating that his request for a retest had been denied. (Ex. 9, pp. 6-7).

b6

B. Management's Response

SA [] stated that there are two portions of the polygraph test; 1) Series I - a counterintelligence (CI) series, and, 2) Series II - a drug and completeness of the application series. The CI series tests truthfulness concerning issues pertaining to espionage. (Ex. 10, p. 2).

b6

[] explained that he goes through an extensive pre-polygraph interview with each applicant. During that interview, [] covers a number of topics having to do with how the applicant is going to respond on the polygraph. (Ex. 10, pp. 3-5). [] then conducts the examination. Once finished, he makes an evaluation and decides whether a further interview is required. (Ex. 10, p. 6).

b6

[] conducted the polygraph of complainant on May 11, 2006. He said he followed the procedures outlined above. Upon completion of the CI series, he said, it appeared that complainant had been deceptive. (Ex. 10, p. 7). [] said he explained to complainant that complainant was having problems with the questions, and that [] needed to interview him further. It was during this interview that complainant volunteered that he was Jewish. [] claimed to have had "no knowledge that he (complainant) was Jewish" prior to complainant's statement. (Ex. 10, p. 8). [] asked complainant whether, in any of his travels, which were extensive, he may have met a representative of a foreign embassy or a foreign intelligence organization. According to [] complainant said he did not. (Id.).

b6

[] asserted that he behaved toward complainant the same way he behaved toward all applicants. He did mention Mossad to complainant, as he typically discusses foreign intelligence services with applicants. He denied manipulating the polygraph in any way. (Ex. 10, p. 9).

b6

C. Other witnesses

[redacted] Supervisory Special Agent in the polygraph unit at FBI Headquarters, said that examiners regularly adjust the polygraph machine to improve the quality of the tracings or to better position them on the examinee's body. (Ex. 11, p. 3). [redacted] said he made an independent review of complainant's test and found that the Series I answers were deceptive and the Series II questions were inconclusive. (Ex. 11, pp. 3-4.)

b6

[redacted] Unit Chief, Personnel Security Adjudication Section/Applicant Adjudication Unit, explained that if an applicant requests a retest, the request is sent to her unit. The request is then reviewed by AAU. (Ex. 13, p. 3). The decision not to retest complainant was made after review of all relevant materials. [redacted] stated that it is more difficult to get a retest when Series I answers have been found to be deceptive. (Id.).

b6

[redacted] Supervisory Special Agent who was assigned to the Security Division at FBI Headquarters, had the authority to grant another polygraph. She said it is very rare that a retest is granted when a person fails the Series I questions. (Ex. 14, p. 3). Further, based on a review of complainant's lack of admissions, the fact that he had not been entirely accurate on another form regarding foreign travel and residences, and the fact that he had difficulty with the Series II questions, she determined that the chances he would pass a second test were unlikely, and thus denied his request for a second examination. (Id.)

b6

2. Analysis

Title VII requires that "[a]ll personnel actions affecting employees or applicants for employment . . . in executive agencies . . . be made free from any discrimination based on race, religion, or national origin." 42 U.S.C. § 2000e-16(a).

Since, in this case, there is no direct evidence of discrimination in the record, such as slurs or any other evidence that, if believed, would require a conclusion that FBI officials' actions were motivated by complainant's race, religion, or national origin, this case must be analyzed to see if there is indirect evidence of discrimination. See Price v. Federal Express Corp., 283 F.3d 715, 720 (5th Cir. 2002), citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). The focus of the analysis is whether the record demonstrates that FBI

U.S. 502, 506 (1993).

A. Discrimination Claims

Management officials articulated legitimate, non-discriminatory reasons for denying the second polygraph. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254-256 (1981). Specifically, management has pointed to complainant's polygraph failure and FBI policies concerning failures as justification for the actions they took. Those policies generally do not provide for a retest when a person fails the Series I questions. Further, [] pointed to complainant's failure to properly fill out another form as additional justification for denying a second polygraph.

b6

With regard to his racial discrimination claim, the record has produced no evidence that he was subjected to discriminatory treatment because he was white. In fact, other than [] race being different from complainant's, complainant has pointed to no factor that would suggest [] or anyone else discriminated against him because he was white.

b6

With regard to his religion, the only evidence complainant has produced is the alleged statement by [] about "the Hebrew faith." [] denied making the statement. In these circumstances, in a Title VII case, the burden of proof remains at all times with the complainant. See e.g. Fallon v. State of Illinois, 882 F.2d 1206 (7th Cir. 1989); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993). Regardless, even if [] knew complainant was Jewish, and did make the statement about complainant being Jewish, a mere reference to a person's religious background does not suffice to impute religious animus sufficient to implicate Title VII.

b6

Finally, with regard to national origin, the only acts complainant could point to were questions by [] about complainant's national origin. Questioning a candidate for an [] position about his national origin, travels, etc., is within the realm of reasonable inquiries for such a sensitive position, as the executive branch is given considerable deference in matters involving national security, including the hiring of []. See e.g. Molerio v. F.B.I., 749 F.2d 815 (D.C. Cir. 1984).

b6

Decision

In sum, given the totality of the record, there is insufficient evidence to suggest that management's explanations for not providing a second polygraph were pretext for some other agenda, and there is insufficient evidence that complainant was singled out for adverse treatment because he was white, Jewish, and Iranian by birth. Relief is denied.



Mark L. Gross
Complaint Adjudication Officer



Attorney
Complaint Adjudication Office

b6

U.S. Department of Justice

Complaint of Discrimination

(See Instructions on Reverse)

PRIVACY ACT STATEMENT: 1. AUTHORITY-The authority to collect this information is derived from 42 U.S.C. Section 2000e-16; 29 CFR Sections 1614.106 and 1614.108. 2. PURPOSE AND USE: This information will be used to document the issues and allegations of a complaint of discrimination based on race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental), sexual orientation or reprisal.

200 SEP 28 P 4:16
This information will be used to indicate an investigation will become part of the complaint file during the investigation; hearing, if any; adjudication; and appeal, if one, to the Equal Employment Commission. EFFECTS OF NONDISCLOSURE: Submission of this information is MANDATORY. Failure to furnish this information will result in the complaint being returned without action.

1. Complainant's Full Name [Redacted]
Street Address, RD Number or Post Office Box Number [Redacted]
City, State and Zip Code [Redacted]
2. Your Telephone Number (including area code)
Home [Redacted]
Work [Redacted]

3. Which Department of Justice Office Do You Believe Discriminated Against You? FBI

A. Name of Office Which You Believe Discriminated Against You.

Baltimore Field Office
Polygraph Unit

4. Current Work Address

A. Name of Agency Where You Work

B. Street Address of Your Agency

B. Street Address of Office

2600 Lord Baltimore Dr.

City, State and Zip Code

C. City, State and Zip Code

Windsor Mill
MD 21244

5. Date on Which Most Recent Alleged Discrimination Took Place

Month Day Year

06/25/2010

6. Check Below Why You Believe You Were Discriminated Against?

☐ Race or Color (Give Race or Color)

☐ Religion (Give Religion)

☐ Sex (Give Sex) ☐ Male ☐ Female

☐ Sexual Harassment

☐ Age (Give Age)

☒ National Origin (Give National Origin) Turkish

☐ Disability ☐ Physical ☐ Mental

☐ Sexual Orientation

☐ Reprisal

☐ Parental Status

☐ Class Complaint

7. Explain how you were discriminated against (Treated differently from other employees or applicants) Because of Your Race, Color, Religion, Sex, Age, Handicap, Reprisal, or National Origin (You may continue your answer on another sheet of paper if you need more space).

I had polygraph exam on June 25, 2010 that conducted by [Redacted] at Baltimore Field Office. See detail ->

8. What Corrective Action Do You Want Taken on Your Complaint?

Please re-consider for empl [Redacted]

9. A) I Have Discussed My Complaint With an Equal Employment Opportunity Counselor and/or other EEO Official:

B. Name of Counselor:

DATE OF FIRST CONTACT WITH EEO OFFICE:

8/18/2010

DATE OF RECEIPT OF NOTICE OF FINAL INTERVIEW WITH EEO COUNSELOR

9/10/2010

☐ I Have Not Contacted an EEO Counselor

Deemed filed. 9/23/10 (Postmark)

AMC 9/30/10

I had a job interview for [redacted] 4/13/2010. On June 4, 2010, I had a phone call from [redacted] (FBI-HR) regarding conditional job offer. I accepted and investigation process started. I went to Baltimore Field Office for fingerprint and drug test on June 18, 2010. On June 25, 2010, I went to same field office for polygraph.

b6

My polygraph exam was conducted by [redacted] on June 25, 2010 and took about 45 minutes. [redacted] read the routine disclosure statement about polygraph and I signed the paper on the computer. He stated that he does not care about anything but "espionage". This was the first time that I heard this word. I was glad that he explained what the espionage mean. I never heard because, I never had interest to do this kind of thing. He also said that he does not care if I steal over \$500 valued properties or anything. He said that he reviewed my SF-86 form [redacted]

b6

He wanted me to write a number on a piece of paper and I wrote number 4. He wanted me to sit that chair for test. He taped that number on the wall in front of me. He asked the questions and he wanted me to say "no" when he asked if this number is 4. He wanted me to lie to him to test his computer and I did whatever he said. I was expecting that he will interview with me to understand what kind of person I am. However, he continued asking his main questions 3 times. He wanted me to answer "yes" these set of questions such as "Do you live in Maryland?" which is irrelevant questions. He also wanted me to answer "no" these questions such as "Have you lied to any officials?" "Have you ever thought to harm US?" etc. and espionage and terrorism related questions.

After he repeated 3 times to same questions and he told me that he could not read my mind. He wanted to know what was I thinking when he asked me questions about espionage. I told him that I was not thinking anything other than focus on the questions. I told him truth and I never lied to any officials. He also turned the chair and sit backward. He seems that he was investigating or questioning criminal person. When I said I did not lie to him, he said that this is over and took me from the chair and took me to lobby and he said I can go. After all of these, I was still positive that I passed this polygraph because I did not lie to him.

Here are the summary of the points that I feel discriminated:

First of all he came to this polygraph exam with pre-convinced idea about my country of origin. He was very negative like he was doing criminal investigation that he is questioning guilty, criminal or terrorist person.

Secondly, he did not interview me before sitting the chair. His job is determining or understanding to see if I am a liar. To do so, he should talk to me for better understanding of me. The polygraph computer cannot tell if that person is liar or not. That job is for human that means someone understand other human. This is [redacted] job which he did not want to understand what kind of person I am.

b6

Finally, he forced me to answer "no" to his certain questions and "yes" to other questions. He did not give me an option and chance to answer these questions truly. It looks like he pushed me to fail or something. His job is not to "read my mind" but understand if I am a liar. He should not act like I am criminal. I have been selected for the position and I will be the future FBI employee not criminal. He should act positively.

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I knew myself that I am not a criminal or a terrorist. So, I requested 2nd polygraph when I received a letter from [redacted] Polygraph Unit Chief on July 8, 2010. I have received a letter from [redacted] Section Chief of Security Division, stated that my request for 2nd poly has not been authorized.

In summary; I did not understand how he came up with his conclusion in less than 45 minutes without an interview with me. Why he act like questioning criminal person? Why he is only interested in "espionage or terrorism" related questions? Why he was trying to read my mind instead of trying to understand what kind of person I am? Why I did not get a 2nd polygraph with another polygraph examiner?

Please check my SF-86 form [redacted]

My background was investigated several times by the different agencies. I have a proven background and job history that I always be a good citizen of US.

b6

Please feel free to call me at [redacted] if you need more detail about this matter.

9-22-10



b6

CRONOLOGICAL DATA REGARDING FBI EMPLOYMENT AND POLYGRAPH

DOCUMENT DOCUMENT EXPLANATION

DATE TYPE

4/8/2010 e-mail Email from [redacted] for interview confirmation on April 13, 2010

4/13/2010 office I went to [redacted] for an interview

6/4/2010 phone call Phone call from [redacted] (FBI-HR) job offer for [redacted] position

6/9/2010 email Email from [redacted] (FBI-Baltimore) regarding form SF86

6/16/2010 email Email from [redacted] (FBI-Baltimore) for Initial PSI on June 18, 2010

6/18/2010 office I went to Baltimore office for fingerprint and drug test

6/25/2010 office I went to Baltimore office for polygraph exam (Examiner name was [redacted])

6/28/2010 letter Letter from [redacted] FBI Polygraph Unit Chief, regarding failing to polygraph

7/8/2010 letter I sent a letter to [redacted] and request for 2nd polygraph with explanations

7/22/2010 email I emailed to [redacted] for follow up to my request letter to [redacted]

8/4/2010 letter Letter from [redacted] Security Division Section Chief, stated 2nd poly will not authorized.

8/9-8/18 phone call

I have called several EEO Counselor to complaint about the discrimination issue.

I have contacted and left messages to:

[redacted] left a message on 8/10/2010 and no response

[redacted] she is out of the office until 8/29/2010

[redacted] I spoke with her and she was so busy and did not take the complaint

[redacted] left a message and also spoke with her, she was busy and did not take the complaint

[redacted] EEO Program Manager, spoke with her on 8/13/10 and she gave me the 3 contact name.

Called [redacted] left a message on 8/13/2010 and no response

Called [redacted] on 8/18/2010 and she took the complaint.

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10. Date of This Complaint:

Month Day Year

09/22/2000

11. Sign Your (Complainant's) Name Here:

[Redacted Signature Box]

b6

FORM DOJ-201A
MAR. 2001

READ CAREFULLY

• This form should be used only if you, as an applicant for Federal Employment or as a Federal Employee, think you have been discriminated against because of race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental), sexual orientation, parental status or reprisal by a FEDERAL agency, and have presented the matter for informal resolution to an Equal Employment Opportunity (EEO) Counselor within 45 calendar days of the date the incident occurred or, if a personnel action, within 45 calendar days of its effective date.

• Your complaint must be filed within 15 calendar days of the date of your receipt of the Notice of Final Interview with the EEO Counselor. If the matter has not been resolved to your satisfaction within 30 calendar days of you contacted the EEO Office and the final counseling interview has not been completed within that time, you have the right to file a complaint at any time thereafter up to 15 calendar days after your receipt of the Notice of Final Interview. These time limits will only be extended under limited circumstances.

• The EEO Counselor or the EEO Officer will assist you in preparing your complaint, upon request.

• Your written complaint should be filed by you with the EEO Officer for the Bureau where the alleged discrimination occurred.

• You may have a representative at all stages of the processing of your complaint.

• You will have an opportunity to talk with an impartial investigator and present all the facts which you believe support your complaint of discrimination.

• After the investigation of your complaint has been completed, you will be furnished a copy of the investigative file. You will then be given an opportunity to request a final agency decision by the Department of Justice's Complaint Adjudication Officer (CAO) or a hearing before the Equal Employment Opportunity Commission (EEOC), which will be conducted by an Administrative Judge of the EEOC. At the hearing, which will be held at a convenient time and place, you may present witnesses and other evidence in your behalf.

• If your complaint is based upon sexual orientation or parental status, your investigative file will be reviewed by the Department of Justice's CAO and a final decision will be rendered with no entitlement for further administrative review.

• If a hearing is held on your complaint, the CAO will take final action on your complaint by issuing a final order. The final order will notify you whether or not the agency will fully implement the Administrative Judge's decision and it will explain your appeal rights. If you elect to have an immediate final agency decision without having a hearing, the CAO will take final action on your complaint by issuing a final agency decision which consists of findings on the merits of each issue in the complaint. The final agency decision will also include an explanation of your appeal rights.

• If you are not satisfied with the final order or agency decision, you have the right to file a written appeal with the EEOC, Washington, DC, within 30 calendar days after your receipt of the final order or final agency decision. A copy of your appeal must be provided to the agency at the same time it is filed with the EEOC.

• If your complaint is based on race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental) or reprisal, you also have the right to file a civil action in the appropriate Federal District Court:

(a) Within 90 days of receipt of the final action on an individual or class complaint if no appeal has been filed;

(b) Within 180 days of filing an individual or class complaint if an appeal has not been filed and final action has been taken;

(c) Within 90 days of receipt of the Commission's final decision on appeal; or

(d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

NOTE: Special statutory provisions (PL 93-259) relating to the right to file a civil action apply to age discrimination complaints.



U.S. Department of Justice

Complaint Adjudication Office

EEOC Docket Number [redacted]
Agency Complaint Number [redacted]
DOJ Number [redacted]

b6

950 Pennsylvania Avenue, N.W.
Patrick Henry Building, Room A4010
Washington, DC 20530

MAR 23 2012

RECEIVED
2012 MAR 26 P 2:52
OFFICE OF EEO AFFAIRS



b6

Dear [redacted]

This is in reference to the complaint of employment discrimination that you filed against the Federal Bureau of Investigation. Enclosed is the Department of Justice's Final Order and Memorandum Explaining the Final Order. The Department agrees with the Administrative Judge's decision that found no discrimination in your complaint.

Rights of Appeal

You have the right to appeal any part of the Administrative Judge's decision to the Equal Employment Opportunity Commission (EEOC). You may do so by filing your appeal with the EEOC's Office of Federal Operations within 30 days of the date you receive this decision. If you are represented by an attorney of record, the 30-day appeal period shall begin to run on the day your attorney receives this decision. The EEOC requires that you use EEOC Form 573, Notice of Appeal/Petition, a copy of which is attached, to appeal this decision. The Notice should indicate what is being appealed. Please attach a copy of the Final Order to the Notice of Appeal. The Notice of Appeal should be sent to the Director, Office of Federal Operations, EEOC, Post Office Box 77960, Washington, D.C. 20013, by mail, personal delivery, or facsimile (202-663-7022). A copy of your notice of appeal must be sent to [redacted] Unit Chief, Room PA-400, JEH Bldg., 935 Pennsylvania Avenue, N.W., Washington, D.C. 20535. The Notice of Appeal that you file with the EEOC must contain, or must have attached to it, the date and method by which you sent the copy of your notice to the agency's representative. You have the right to file a brief or statement in support of your appeal, and any such document must be filed with EEOC within 30 days of filing the notice of appeal, in the manner of submission specified above. If you submit a brief by facsimile, the EEOC requires that the brief be limited to no more than 10 pages.

b6

SEE INSTRUCTIONS TO CLOSE BY 7/20/2012 IF NO
APPEAL OR CIVIC ACTION FILED.

-2-

You also have the right to file a civil action in the appropriate United States District Court within 90 days of the date you receive this decision, provided you have not already filed an appeal with the EEOC. In filing your federal complaint, you should name the Attorney General, Eric H. Holder, Jr., as the defendant. If you have already filed an appeal with the EEOC, you may file in federal court only after 180 days have passed from the date of filing an appeal with the EEOC with no final decision by the Commission.

If you cannot afford to file a civil action, you can ask the court to allow you to file the action at no cost to you. The court may also provide you with an attorney if you cannot afford to hire one to represent you in your civil action. Questions concerning when and how to file a waiver of costs should be directed to your attorney or the District Court clerk.

Sincerely,



Mark L. Gross

Complaint Adjudication Officer

cc:



Stephanie L. Merkel

b6

The U.S. Equal Employment Opportunity Commission

OFFICE OF FEDERAL OPERATIONS

P.O. Box 77960

Washington, DC 20013

Complainant Information: (Please Print or Type)

Complainant's name (Last, First, M.I.):	
Home/mailling address:	
City, State, ZIP Code:	
Daytime Telephone # (with area code):	
E-mail address (if any):	

Attorney/Representative Information (if any):

Attorney name:	
Non-Attorney Representative name:	
Address:	
City, State, ZIP Code:	
Telephone number (if applicable):	
E-mail address (if any):	

General Information:

Name of the agency being charged with discrimination:	
Identify the Agency's complaint number:	
Location of the duty station or local facility in which the complaint arose:	
Has a final action been taken by the agency, an Arbitrator, FLRA, or MSPB on this complaint?	<input type="checkbox"/> Yes; Date Received: _____ (Remember to attach a copy) <input type="checkbox"/> No <input type="checkbox"/> This appeal alleges a breach of settlement agreement
Has a complaint been filed on this same matter with the EEOC, <u>another</u> agency, or through any <u>other</u> administrative or collective bargaining procedures?	<input type="checkbox"/> No <input type="checkbox"/> Yes (Indicate the agency or procedure, complaint/docket number, and attach a copy, if appropriate)
Has a civil action (lawsuit) been filed in connection with this complaint?	<input type="checkbox"/> No <input type="checkbox"/> Yes (Attach a copy of the civil action filed)

NOTICE: Please attach a copy of the final decision or order from which you are appealing. If a hearing was requested, please attach a copy of the agency's final order and a copy of the EEOC Administrative Judge's decision. Any comments or brief in support of this appeal **MUST** be filed with the EEOC and with the agency within 30 days of the date this appeal is filed. The date the appeal is filed is the date on which it is postmarked, hand-delivered, or faxed to the EEOC at the address above.

Signature of complainant or complainant's representative:	
Date:	



U.S. Department of Justice

Complaint Adjudication Office

EEOC Docket Number [redacted]
Agency Complaint Number [redacted]
DOJ Number [redacted]

b6

950 Pennsylvania Avenue, N.W.
Patrick Henry Building, Room A4810
Washington, DC 20530

MAR 23 2012

DEPARTMENT OF JUSTICE FINAL ORDER

in the case of

[redacted] v. Federal Bureau of Investigation

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Based on a careful review of the record in this case, it is the determination of the Department of Justice to accept the EEOC Administrative Judge's decision finding that complainant [redacted] was not subjected to discrimination because of his national origin (Turkish) when his request for a second polygraph examination was denied on August 4, 2010.

Mark L. Gross
Complaint Adjudication Officer



U.S. Department of Justice

Complaint Adjudication Office

EEOC Docket Number [redacted]

Agency Complaint Number [redacted]

DOJ Number [redacted]

b6

950 Pennsylvania Avenue, N.W.
Patrick Henry Building, Room A4810
Washington, DC 20530

MAR 23 2012

DEPARTMENT OF JUSTICE MEMORANDUM

Explaining the Final Order

in the case of

[redacted] v. Federal Bureau of Investigation

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EEOC regulations require all agencies that receive an Administrative Judge's decision to issue a final order within 40 days of receipt of the decision. The Department of Justice received the Administrative Judge's decision in this case on February 23, 2012. The final order informs the complainant whether the agency will fully implement the Administrative Judge's decision. 29 C.F.R. 1614.110(a). This office is charged with issuing those final orders on behalf of the Department of Justice and has this day issued a final order in this case. This memorandum explains, for the benefit of the parties, the rationale behind the Department of Justice's decision to fully implement the Administrative Judge's decision.

On September 23, 2010, complainant [redacted] an applicant for [redacted] filed an employment discrimination complaint against the Federal Bureau of Investigation pursuant to Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16. The issue the FBI accepted was whether complainant was discriminated against because of his national origin (Turkish) when his request for a second polygraph examination was denied on August 4, 2010 (Ex. 6, acceptance letter dated December 3, 2010).¹ Complainant claimed that a polygraph examiner asked him inappropriate questions because of a discriminatory animus against him and, as a result, he failed the required pre-employment polygraph examination and his conditional offer of

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¹ The record will be cited as follows: (Ex.) for exhibits from the Report of Investigation, (CF) for the correspondence file, and (AJD) for the Administrative Judge's Decision dated February 13, 2012.

employment with the FBI was rescinded. Complainant filed this complaint after FBI officials denied his request for a second polygraph examination.


After the FBI's EEO office investigated the issues in this case, complainant requested a hearing and the FBI forwarded the record to the EEOC for assignment to an Administrative Judge. On November 30, 2011, the Administrative Judge assigned to the complainant's case issued a notice of intent to issue decision without conducting a hearing (AJD at 2).

On February 2, 2012, the Administrative Judge issued a decision finding no discrimination (AJD). The Administrative Judge issued an Order on February 15, 2012, awarding the FBI summary judgment (CF, Order). The Administrative Judge found that a hearing was unnecessary because the FBI had produced legitimate, nondiscriminatory reasons for its actions which were not pretext for discrimination against complainant (AJD at 5-6).

A careful review of the record supports the Administrative Judge's finding of no discrimination. Therefore, the Department of Justice accepts the Administrative Judge's decision and enters a final order acknowledging that the Administrative Judge's decision will be fully implemented.


Mark I. Gross

Complaint Adjudication Officer


Complaint Adjudication Office

b6



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Dallas District Office

207 S. Houston Street, 3rd Floor
Dallas, TX 75202-4726
(214) 253-2700
TTY (214) 253-2710
FAX (214) 253-2720

FEB 23 2012

IN THE MATTER OF:

[Redacted]

Complainant,

vs.

Eric Holder,
Attorney General,
U.S. Department of Justice,

Agency.

EEOC No. [Redacted]

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Agency No. [Redacted]

ORDER ENTERING JUDGMENT

For the reasons set forth in the enclosed Decision dated February 2, 2012, judgment in the above-captioned matter is hereby entered. A Notice To The Parties explaining their appeal rights is attached.

This office is also enclosing a copy of the hearing record for the agency and a copy of the transcript, if applicable, for the complainant and/or his/her representative.

This office will hold the report of investigation and the complaint file for sixty days, during which time the agency may arrange for their retrieval. If we do not hear from the agency within sixty days, we will destroy our copy of these materials.

It is so ORDERED.

Stephanie L. Merkel

Stephanie L. Merkel
Administrative Judge

Enclosures

Certificate of Service

For timeliness purposes, it shall be presumed that the parties received the foregoing Order Entering Judgment within five calendar days after the date they were sent via first class mail. I certify that on February 15, 2012, the foregoing Order and/or attached documents were sent via first class mail to the following:



b6



Assistant General Counsel
Federal Bureau of Investigation
935 Pennsylvania Ave., NW
Rm. PA-400 North
Washington, DC 20535

Mr. Mark Gross
Complaint Adjudication Officer
U.S. Dept. of Justice
Civil Rights Division - CAO
NALC Bldg. Rm. 409
950 Pennsylvania Ave., NW
Washington, DC 20530



BEFORE THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
DALLAS DISTRICT OFFICE

IN THE MATTER OF:

[Redacted]

Complainant,

vs.

Eric Holder, Attorney General,
U.S. Department of Justice,

Agency.

EEOC No. [Redacted]

b6

Agency No. [Redacted]

ADMINISTRATIVE JUDGE'S SUMMARY DECISION

Complainant:

[Redacted]

b6

Agency Representative:

[Redacted]

Assistant General Counsel
Federal Bureau of
Investigation
935 Pennsylvania Ave., NW
Rm. PA-400 North
Washington, DC 20535

Administrative Judge:

Stephanie L. Merkel
EEOC Dallas District Office
207 S. Houston Street
Dallas, Texas 75202

I. INTRODUCTION

Pursuant to 29 C.F.R. §1614.109(f) and §1614.109(g) of the Regulations of the Equal Employment Opportunity Commission, it has been determined that a summary decision is appropriate in this case. The following summarizes the events which have led to this decision.

On November 30, 2011, the Administrative Judge issued a Notice of Intent to Issue a Decision Without a Hearing in this case. The Agency filed a response to this Notice; the Complainant did not. However, prior to the issuance of this Notice the Complainant submitted a statement which was considered in this decision. Upon a review of the investigative file and the parties' submissions, I determined that a summary decision is appropriate.

II. ISSUE

The issue in this case is as follows: Whether the Complainant was discriminated against due to his national origin (Turkish) when he was inappropriately questioned during his pre-employment polygraph examination, and his request for a second pre-employment polygraph examination was denied.

III. FINDINGS OF FACT

The following facts were outlined in the Notice of Intent:

1. The Complainant (Turkish) applied for a position with the Agency as [REDACTED]. He received a job offer conditional on undergoing a personnel security interview and pre-employment polygraph examination. All new hires are required to undergo such an examination (IF, Exhs. 9, 10).

2. Special Agent [REDACTED] conducted the polygraph examination. He conducted 284 polygraph examinations in 2010. [REDACTED] stated that the questions asked during the examination relate to suitability and security. He stated that the same questions are asked of every applicant. [REDACTED] stated that the results of the Complainant's examination showed deception during the security portion of the examination (IF, Exh. 10).

3. [REDACTED] examination was reviewed by [REDACTED] Supervisory Special Agent. She conducted an

4-75
independent quality control review of the Complainant's polygraph examination. She stated that when she conducts her review she is unaware of the results reached by the polygraph examiner who conducted the original examination. Ms. [redacted] results from her quality control review of the Complainant's polygraph examination showed deception with regard to the security series of questions (IF, Exh. 11).

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4. The Complainant submitted a request for another examination. [redacted] Supervisory Special Agent, reviewed the Complainant's request. [redacted] reviewed all of the materials related to the Complainant's polygraph examination. He stated that he recommended that the Complainant's request be denied because he found no deficiencies or factors that could have affected the examination results (IF, Exh. 12).

5. A statistical analysis of polygraph examinations administered by [redacted] in 2010 show that of 219 examinations conducted on applicants for positions, 30.59% failed, 8.68% showed no opinion, 10.5% were inconclusive, and 50.23% passed (IF, Exh. 20).

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The following uncontroverted facts were tendered by the parties:

6. The job announcement online application asks applicants to provide city and state of birth (Complainant's Submission dated November 21, 2011).

7. Of the other applicants given pre-employment polygraph examinations by [redacted] were individuals from Pakistan and Russia who passed the examinations. [redacted] also gave pre-employment polygraph examinations to applicants from Korea and Russia who failed the examination (Agency's Response to Notice; IF, Exh. 10).

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V. APPLICABLE LAW

In any proceeding, judicial or administrative, involving a complaint of discrimination, it is the burden of the complainant to establish initially that there is some substance to the allegation of discrimination. In order to meet this burden, the complainant must establish a prima facie case of discrimination. Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978);

Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). This means that the complainant must present a body of evidence such that, were it not rebutted, the trier of fact could conclude that unlawful discrimination did occur.

If the complainant meets the burden of presenting a prima facie case, the agency has a burden of production to articulate some legitimate, non-discriminatory reason for its actions. Page v. United States Industries, 726 F.2d 1038, 1055 (5th Cir. 1984). If the agency does so, the complainant has the burden to demonstrate that the reason articulated is a pretext for discrimination. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Pretext may be shown by either direct or indirect evidence of discrimination, either by showing that the agency's explanation is not worthy of belief or by showing that a discriminatory motive was more likely. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 125 L.Ed.2d 407, 113 S.Ct. 2742 (1993); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); E.E.O.C. v. Ackerman, Hood & McQueen, Inc., 956 F.2d 944, 947-948 (10th Cir. 1992); Luna v. City and County of Denver, 948 F.2d 1144, 1148 (10th Cir. 1991); Kendall v. Block, 821 F.2d 1142, 1145-46 (5th Cir. 1987). The burden to show discrimination remains at all times with the complainant. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); Smith v. Wal-Mart Stores, 891 F.2d 1177, 1179 (5th Cir. 1990); Valentino v. U.S. Postal Service, 674 F.2d 56, 61 (D.C. Cir. 1982).

VI. ANALYSIS

An Administrative Judge is authorized to render findings of fact and conclusions of law without a hearing when there are no disputed material facts. 29 C.F.R. §1614.109(e)(2). This regulation is modeled after Rule 56 of the Federal Rules of Civil Procedure and adopts that rule's standards. Wilson v. U. S. Postal Service, EEOC Appeal No. 01A10516 (May 8, 2001). The Supreme Court has enunciated these standards as:

Under Rule 56c, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." In our view, the plain language of Rule 56c, mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In this case, I find that summary judgment is appropriate as discussed below.

It should be recognized that each complainant's allegations of discrimination are premised on a particular set of facts. The evidence required to establish a prima facie case must, of necessity, vary from one case to the next.

In order to establish a prima facie case of discrimination on the basis of national origin in a non-selection case, the Complainant may show that he is a member of a protected group, that he applied for and was qualified for the position, and that an individual outside of his protected group was selected, and/or there is other information from which a prima facie case may be found.

However, in a case such as this, where the Agency has articulated legitimate, nondiscriminatory reasons for its actions, there is no need to first determine whether a prima facie case has been established. Instead, I will look to the Agency's reasons and evidence of pretext.

In order to meet its burden of production, the Agency must do more than make general assertions. The Agency must be able to explain the motivation for its actions and the facts that were considered. Pitre v. Western Electric Co., 843 F.2d 1262, 1266 (10th Cir. 1988); Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 817 (5th Cir.), cert. denied, 459 U.S. 1038, 103 S.Ct. 452, 74 L.Ed.2d 605 (1982).

The Agency presented evidence that all applicants were subjected to a pre-employment polygraph examination, and all were asked the same questions as the Complainant. The Agency presented evidence that after the polygraph examiner reviewed the results, the examination was sent to [redacted] a polygraph examiner, who conducted an independent review of the examination and did not know the results of [redacted] analysis or the Complainant's national origin. The record shows

b6

that both [] and [] independently reached the conclusion that the Complainant's polygraph examination indicated deception. The evidence also shows that after the Complainant requested a retake, the request was reviewed by [] who found no basis to grant a retake. b6

Thus, the Agency articulated a legitimate, non-discriminatory reason for its actions. It was sufficiently clear and specific to afford the Complainant an opportunity to show pretext.

The Complainant argued that he has worked in positions requiring background checks, and has taken a previous polygraph examination from another employer. He stated that he felt that [] acted like he was conducting a criminal investigation. b6

The record contains no evidence to show that the Complainant was treated differently from any other candidate either in the requirement for a polygraph examination, the questions asked during the polygraph examination, or the way the results are scored. The record shows that almost one-third of the persons taking a pre-employment examination fail the exam, and presumably they are not of the Complainant's national origin. In addition, the record contains no evidence that there was a basis for which the Agency should have granted a retake of the polygraph examination, or that the Complainant was treated any differently from any other candidate with regard to his request for a retake.

I find that the evidence fails to support Complainant's assertion that the Agency's legitimate, non-discriminatory reason was a pretext for discrimination.

VII. FINDINGS AND DECISION

I find that even assuming a prima facie case of discrimination, the Complainant has failed to present or identify any material facts which place the Agency's articulated nondiscriminatory reasons for its actions in dispute or demonstrate pretext. I therefore find no discrimination.

Ordered February 2, 2012.

Stephanie L. Merkel

STEPHANIE L. MERKEL

ADMINISTRATIVE JUDGE

Equal Employment Opportunity
Commission

207 S. Houston Street

Dallas, TX 75202

Fax - [REDACTED]

E-Mail: [REDACTED]

b6

NOTICE TO THE PARTIES

This is a decision by an Equal Employment Opportunity Commission Administrative Judge issued pursuant to C.F.R. §1614.109(i). EEOC regulations require the Agency to take final action on the complaint by issuing a final order within 40 calendar days of receipt of the hearing file and this decision. The Agency's final order shall notify the complainant whether or not the Agency will fully implement this decision, and shall contain notice of the complainant's right to appeal to the Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for such appeal or lawsuit. With the exception detailed in the next paragraph, complainant may not file an appeal to the Commission directly from this decision. Rather, complainant may appeal to the Commission within 30 calendar days of receipt of the Agency's final order concerning its implementation of this decision. If the final order does not fully implement this decision, the Agency must also simultaneously file an appeal to the Commission in accordance with 29 C.F.R. §1614.403, and append a copy of the appeal to the final order. A copy of EEOC Form 573 must be attached to the final order.

The Complainant may only appeal directly from this decision in the event that the Agency has not issued its final order within 40 calendar days of its receipt of the hearing file and this decision. In this event, the complainant should append a copy of the Administrative Judge's decision to the appeal. The complainant should furnish a copy of the appeal to the opposing party at the same time it is filed with the Commission, and such service was made on the opposing party. The allegations raised in connection with a loss or harm to a term, condition or privilege of employment must relate to alleged violations of either Title VII, the ADEA the EPA or the Rehabilitation Act. See, 29 CFR Section 1614.103 All appeals to the Commission must be filed by mail, personal delivery or facsimile.

By Mail:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
P. O. Box 77960
Washington, D.C. 20013

Memorandum



Subject: Final Order in [redacted] v. FBI,
Agency Case No. [redacted]

Date:

MAR 23 2012

b6

To: [redacted]
Unit Chief
Federal Bureau of
Investigation

From: [redacted] *flr*
Supervisory Attorney
Complaint Adjudications
Office

Enclosed is the Department of Justice Final Order and Memorandum in Support of the Final Order in the above case. The Order accepts the Administrative Judge's finding of no discrimination in this case. Under EEOC regulations, complainant has 30 days from receipt of the Order to file an appeal with the EEOC's Office of Federal Operations. If complainant files an appeal, the regulations require that you be sent a copy of the appeal. Upon receipt of any appeal, you should contact the FBI's EEO Office so that the EEO Office may timely forward the case file to the EEOC's Office of Federal Operations. If you have any questions about this mailing, please contact me at [redacted]

cc:

b6

[redacted]
Stephanie L. Merkel

Complaint of Discrimination

(See instructions on reverse)

PRIVACY ACT STATEMENT: 1. AUTHORITY- The authority to collect this information is derived from 42 U.S.C. Section 2000e-16; 29 CFR Sections 1614.106 and 1614.108. 2. PURPOSE AND USE- This information will be used to document the issues and allegations of a complaint of discrimination based on race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental), sexual orientation or reprisal.

The signed statement will serve as the record necessary to initiate an investigation and will become part of the complaint file during the investigation; hearing, if any; adjudication; and appeal, if one, to the Equal Employment Opportunity Commission. 3. EFFECTS OF NON-DISCLOSURE- Submission of this information is MANDATORY. Failure to furnish this information will result in the complaint being returned without action.

1. Complainant's Full Name [REDACTED] OFFICE OF EEO AFFAIRS

2. Your Telephone Number (including area code)

Home [REDACTED]

Work [REDACTED]

Street Address, RD Number, or Post Office Box Number [REDACTED]

City, State and Zip Code [REDACTED]

3. Which Department of Justice Office Do You Believe Discriminated Against You? **FBI**

4. Current Work Address

[REDACTED]

A. Name of Agency Where You Work

[REDACTED]

B. Street Address of Office

B. Street Address of Your Agency

[REDACTED]

C. City, State and Zip Code

C. City, State and Zip Code

[REDACTED]

D. Title and Grade of Your Job

[REDACTED]

5. Date on Which Most Recent Alleged Discrimination Took Place

Month Day Year

11 | 9 | 2007

6. Check Below Why You Believe You Were Discriminated Against:

- ☒ Race or Color (Give Race or Color) **AFRICAN AMERICAN**
- ☐ Religion (Give Religion) _____
- ☒ Sex (Give Sex) ☐ Male ☒ Female
- ☐ Sexual Harassment
- ☐ Age (Give age) _____
- ☐ National Origin (Give National Origin) _____
- ☐ Disability ☐ Physical ☐ Mental

- ☐ Sexual Orientation
- ☐ Reprisal
- ☐ Parental Status
- ☐ Class Complaint

7. Explain How You Believe You Were Discriminated Against (treated differently from other employees or applicants) Because of Your Race, Color, Sex (including sexual harassment), Religion, National Origin, Age, Disability (physical or mental), Sexual Orientation, Parental Status, or Reprisal. Do not include specific issues or incidents that you have not discussed with your EEO Counselor. You may continue your answer on another sheet of paper if you need more space.)

I believe I was discriminated against as a black female, because white males who passed all portions of preliminary testing were hired. I passed every test that I took and every test examination that I was told to take. I met the requirements set forth in my conditional appointment letter, yet I was refused employment. White males who meet the requirements set forth in their condition

8. What Corrective Action Do You Want Taken on Your Complaint?

Hire

9. A) I have discussed my complaint with an Equal Employment Opportunity Counselor and/or other EEO Official.

B) Name of Counselor

DATE OF FIRST CONTACT WITH EEO OFFICE:

04 | 8 | 2008

DATE OF RECEIPT OF NOTICE OF FINAL INTERVIEW WITH EEO COUNSELOR:

[REDACTED]

I Have Not contacted an EEO Counselor

10. Date of This Complaint:

Month Day Year

06 | 24 | 2008

11. Sign Your Name Here:

[REDACTED]

b6

Deemed filed: July 5, 2008 (Postmark)

MCL 7/14/08

Appointment letters get hired. The basis to refuse me employment is my race and/or gender. Black females are subjected to an entirely different level of scrutiny. I was given a polygraph test in Memphis and told that I failed, which was given by a male white. I requested a retake and was told that I passed the second polygraph test taken in Nashville, TN., which was given by a male black. The FBI office has disparately affected African Americans in general in their failure to hire such. The Memphis FBI office has a disproportionate number of females to males as well. I believe that I have been discriminated against on account of my race and/or gender. I have been treated unfair and unequal. The agency is still hiring.



U.S. Department of Justice
Complaint Adjudication Office

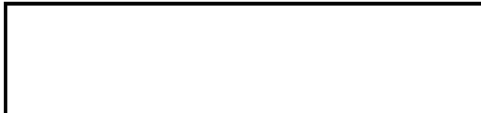
Agency Complaint Number- [REDACTED]
DJ Number [REDACTED]

RECEIVED

2010 FEB 4 A 11 16

950 Pennsylvania Avenue, NW
Office of EEO Affairs
Washington, DC 20530

FEB 2 2010



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Dear [REDACTED]

This is in reference to your complaint of discrimination that you filed against the Federal Bureau of Investigation. Under the Department of Justice's equal employment opportunity regulations, the Complaint Adjudication Officer renders the final Department of Justice decision on your complaint. Enclosed is the final Department of Justice decision.

Rights of Appeal

First, you have the right to appeal any part of this decision to the Equal Employment Opportunity Commission (EEOC). You may do so by filing your appeal within 30 days of the date you receive this decision. If you are represented by an attorney of record, the 30-day appeal period shall begin to run the day your attorney receives this decision. The appeal must be in writing. The Commission prefers that you use EEOC Form 573, Notice of Appeal/Petition, a copy of which is attached, to appeal this decision. The notice of appeal should be sent to the Director, Office of Federal Operations, EEOC, Post Office Box 19848, Washington, D.C. 20036, by mail, personal delivery, or facsimile. You must also send a copy of your notice of appeal to [REDACTED] EEO Officer, Federal Bureau of Investigation, 10th & Pennsylvania Avenue, N.W., Room 7901, Washington, D.C. 20535. You must state the date and method by which you sent the copy of your notice to the agency's EEO Officer either on, or attached to, the notice of appeal you mail to the EEOC [REDACTED]

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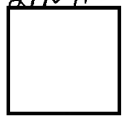
Second, you have the right to file a civil action in the appropriate United States District Court within 90 days of the date you receive this decision. In filing your federal complaint, you should name the Attorney General, Eric Holder, Jr., as the defendant. Even if you appeal this decision to the EEOC, you still have the right to go to federal court. You may file a civil action in the United States District Court within 90

SET TICKLER TO CLOSE BY 5/10/10 IF NO
APPEAL OR CIVIL ACTION FILED.

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MC
2/12/10

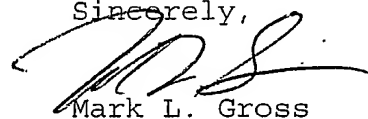
MW



days of the day you receive the Commission's final decision on your appeal, or after 180 days from the date you filed your appeal with the Commission, if the Commission has not made a final decision by that time.

If you cannot afford to file a civil action, you can ask the court to allow you to file the action at no cost to you. The court may also provide you with an attorney if you cannot afford to hire one to represent you in your civil action. Questions concerning when and how to file a waiver of costs should be directed to your attorney or the District Court clerk.

Sincerely,



Mark L. Gross

Complaint Adjudication Officer

cc:



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NOTICE OF APPEAL/PETITION
TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS

P.O. Box 19848
 Washington, DC, 20036

Complainant Information: (Please Print or Type)

Complainant's name (Last, First, M.I.):	
Home/mailling address:	
City, State, ZIP Code:	
Daytime Telephone # (with area code):	
E-mail address (if any):	

Attorney/Representative Information (if any):

Attorney name:	
Non-Attorney Representative name:	
Address:	
City, State, ZIP Code:	
Telephone number (if applicable):	
E-mail address (if any):	

General Information:

Name of the agency being charged with discrimination:	
Identify the Agency's complaint number:	
Location of the duty station or local facility in which the complaint arose:	
Has a final action been taken by the agency, an Arbitrator, FLRA, or MSPB on this complaint?	<input type="checkbox"/> Yes Date Received _____ (Remember to attach a copy) <input type="checkbox"/> No <input type="checkbox"/> This appeal alleges a breach of a settlement agreement
Has a complaint been filed on this same matter with the EEOC, <u>another</u> agency, or through any <u>other</u> administrative or collective bargaining procedures?	<input type="checkbox"/> No <input type="checkbox"/> Yes (Indicate the agency or procedure, complaint/docket number, and attach a copy, if appropriate)
Has a civil action (lawsuit) been filed in connection with this complaint?	<input type="checkbox"/> No <input type="checkbox"/> Yes (Attach a copy of the civil action filed)

NOTICE: Please attach a copy of the final decision or order from which you are appealing. If a hearing was requested, please attach a copy of the agency's final order and a copy of the EEOC Administrative Judge's decision. Any comments or brief in support of this appeal MUST be filed with the EEOC and with the agency within 30 days of the date this appeal is filed. The date the appeal is filed is the date on which it is postmarked, hand delivered, or faxed to the EEOC at the address above.

Signature of complainant or complainant's representative:	
Date:	

PRIVACY ACT STATEMENT ON REVERSE SIDE.



U.S. Department of Justice
Complaint Adjudication Office

Agency Complaint Number [redacted]
DJ Number [redacted]

b6

950 Pennsylvania Avenue, NW
Patrick Henry Building, Suite 5300
Washington, DC 20530

FEB 2 2010

DEPARTMENT OF JUSTICE FINAL DECISION

in the matter of

[redacted] v. Federal Bureau of Investigation

On July 5, 2008, complainant [redacted] filed an employment discrimination complaint against the Federal Bureau of Investigation, pursuant to Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16. Complainant alleged discrimination on the bases of race (African American) and sex. On September 12, 2008, the FBI EEO office dismissed in part and accepted in part complainant's claims for investigation (Ex. 6). The EEO accepted this claim:

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Whether complainant was discriminated against based on her race (African American) and sex (female) when on March 4, 2008, complainant received a letter rescinding her conditional offer of employment as [redacted] with the FBI.

The FBI EEO office dismissed these claims:

(1) on November 9, 2007, complainant felt like she was being interrogated during her polygraph examination; and

(2) on November 29, 2007, complainant received a letter advising her she did not pass her first polygraph examination.

The Complainant Adjudication Office received the case for issuance of a final decision on February 5, 2009.

Facts

Complainant stated that the FBI extended her a conditional offer of employment as [redacted] on February 21, 2007 (Ex. 3, p. 4). Complainant said the conditional offer of employment letter stated that the "appointment would be rescinded if she

b6

failed the background, physical fitness test, polygraph examination, physical examination, and/or drug testing" (Id. at 5). Complainant said the FBI rescinded the conditional offer on March 14, 2008 (ibid.), and that she was told that she failed the polygraph examination (Ex. 2, p. 3. Complainant did not identify the individual who told her that she did not pass the polygraph examination. Complainant appealed and was allowed to retake the polygraph examination (ibid.). Complainant said she passed the second polygraph examination and met the requirements stated in the conditional offer, yet she again was refused employment (Id. at 1).

Complainant said the hiring process is unfair because the Memphis, Tennessee, Division has traditionally only "processed" white men to [REDACTED] (Ex. 3, p. 5). Complainant said the hiring criteria was "preset for hiring white males" (ibid.). Complainant said the FBI wanted to give the appearance that it attempted to hire a minority, so she was "taken through the motions during the applicant process for statistical reasons" (ibid.). Complainant said she was discriminated against because "it has been ten years since a black female has successfully been processed through the Memphis Division to [REDACTED] (ibid.)).

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[REDACTED] Chief [REDACTED] said a conditional appointment offer requires applicants to be administered a polygraph examination as a part of the preliminary processing (Ex. 11, p. 1). [REDACTED] said all applicants must pass a polygraph in order to continue in the application process (ibid.). [REDACTED] explained that unsuccessful applicants have appeal rights and may request to retake the polygraph examination (ibid.). [REDACTED] said the Polygraph Unit (PU) advised [REDACTED] that complainant had two polygraph failures (Id. at 1, 2), but was granted a retest after being notified by the PU of her first failure (Id. at 2).

[REDACTED] said the [REDACTED] supervisor reviews the polygraph test results and identifies the appropriate code to discontinue the background investigation (ibid.). According to [REDACTED] the code is entered into the Bureau Personnel Management System (BPMS) which automatically generates a generic letter (ibid.). [REDACTED] explained that all applicants who are unsuccessful in passing the polygraph examination are sent a letter generated by the BPMS (ibid.). [REDACTED] said complainant's conditional offer of appointment was rescinded because complainant failed to pass the polygraph (ibid.).

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Special Agent (SA) [] was assigned as the Regional Polygraph Manager for the Knoxville, Tennessee Division (Ex. 14, p. 3). [] said he conducts Quality Control reviews of polygraph examinations conducted in the regions (Id. at 2). [] said he provided a quality review on complainant's polygraph examination administered by SA [] in November 2007 (ibid.). [] said he agreed with [] assessment that no deception was indicated in complainant's responses to questions related to National Security matters (ibid.). [] said deception was indicated in complainant's responses to questions related to use and sale of illegal drugs and completeness of her application (ibid.). b6

[] said he conducted a quality review on complainant's polygraph examination administered by SA [] on February 22, 2008 (ibid.). [] said the polygraph dealt with the drug and application issues (ibid.). [] said he disagreed with [] opinion that complainant did not display deception in her responses (ibid.). [] said, "As the QC reviewer, my decision resulted in an overall polygraph result of DI (deception)" (ibid.). [] said it is FBI standard practice to have another PU Supervisor review charts and documentation when a difference in the evaluation of charts arises (Id. at 2, 3). [] said he sent complainant's second examination charts and documentation to PU Supervisor [] (ibid.). b6

[] said he was not aware of complainant's race, and his opinion regarding the deception in her responses was not influenced by race or sex (ibid.). [] said the race of the person tested is not reflected on the FBI polygraph examination documents (ibid.). b6

Regional Polygraph Program Manager [] is a Regional Program Manager for the Charlotte, N.C., Division (Ex. 15, p. 1). [] said she regularly reviewed polygraph examination results and provided a second opinion for other managers conducting Quality Control Reviews (ibid.). [] said a second review is conducted when a FBI PU Manager or a Regional Polygraph Manager determines a discrepancy exists with a decision made by a Field Polygraph Examiner regarding the results of a polygraph examination (ibid.). [] said neither race or sex is a factor in her opinion regarding the results of a polygraph examination (ibid.). [] said she does not specifically recall her findings regarding her review of complainant's polygraph examination (ibid.). b6

Special Agent (SA) [redacted] is a FBI polygraph examiner (Ex. 12, p. 1). [redacted] said he administered a polygraph examination to complainant, but he does not recall the specifics of the examination (*ibid.*). [redacted] said neither race nor sex is a factor in his administration of the polygraph examinations or evaluation of results (*Id.* at 1, 2). [redacted] said he forwarded the polygraph charts and other documentation to the PU, FBIHQ for Quality Control testing (*Id.* at 2).

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Special Agent [redacted] is a former FBI polygraph examiner (Ex. 13, p. 1). [redacted] said he administered a polygraph examination to complainant in February 2008 (*ibid.*). [redacted] said neither race nor sex were factors in his administration or evaluation of the polygraph examinations (*ibid.*). [redacted] said it was his opinion that complainant passed the polygraph examination with no deception based on complainant's comments and the results of the evaluation (*Id.* at 2). [redacted] said he sent the results of the examination along with accompanying documentation to the FBI PU (*ibid.*). [redacted] said the FBI Quality Control Review staff concluded that complainant was deemed "to have reflected deception" (*ibid.*).

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Analysis

Complainant claimed that she was discriminated against on the bases of sex and race when the FBI rescinded her conditional offer of employment. Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, prohibits discrimination on the bases of race and sex.

The framework for evaluating a discrimination claim under Title VII is found in McDonnell Douglas v. Green, 411 U.S. 792 (1973). In a disparate treatment case involving circumstantial evidence, the burden-shifting test set forth in McDonnell Douglas must be applied. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507-508 (1993), Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-256 (1981). In order to show disparate treatment discrimination under Title VII, the preponderance of the evidence in the record must demonstrate that complainant was treated less favorably than others because of race and sex. St. Mary's Honor Center v. Hicks, 509 U.S. at 510 n.3. Complainant can prevail by showing that FBI the's reasons were a pretext for discrimination and that sex and race were the true reasons complainant's conditional offer of employment was rescinded. St. Mary's Honor Center v. Hicks, 509 U.S. at 515.

I. Timeliness issues

Claims 1-2, as described in the Letter of Acceptance of Issues dated September 12, 2008, occurred November 9 and 29, 2007. Complainant contacted the EEO Counselor on April 8, 2008, regarding these claims (Ex. 6). The FBI EEO dismissed claim one because "it fails to state a claim of discrimination and is untimely," and dismissed claim two because it was untimely (Id. at 2).

EEOC regulations at 29 C.F.R. §1614. 107(a)(1) state that a complaint shall be dismissed if it fails to state a claim under §1614.103. A complainant must allege that she was injured in fact to be an "aggrieved employee" under 1614.103. As to claim one, complainant alleged that she felt that she was interrogated during the polygraph examination. Complainant has not shown how she was aggrieved or suffered a personal loss or harm regarding a term, condition or privilege of her employment when she was administered the polygraph examination. Complainant has not shown that she was subjected to an employment action which has rendered her aggrieved for purposes of stating a claim within the purview of Title VII. The allegation does not challenge an unlawful employment policy or practice. See Stup v. United States Postal Service, EEOC #05990465 (April 1, 2000). The FBI EEO office correctly dismissed the claim.

EEOC Regulation 29 C.F.R. §1614. 105(a)(1) requires that complaints of discrimination be brought to the attention of the EEO Counselor within 45 days of the date of the matter alleged to be discriminatory. Federal employees must contact an EEO Counselor within 45 days of the discriminatory to challenge the discriminatory act. See Clark v. Runyon, 116 F.3d 275, 276 (7th Cir. 1997). The record establishes that complainant contacted the EEO Counselor on April 8, 2008, more than 148 days after the November 9, 2007, incident and more than 130 days after the November 29, 2007, incident. Complainant's failure to contact the EEO Counselor within 45 days of the discriminatory act was grounds for dismissing each claim as untimely.

II. Race and Sex Claims

Complainant is a member of two protected classes, African American and female. Complainant claimed that she was discriminated against when the FBI rescinded her conditional offer of employment. Complainant said the FBI "has disparately affected African Americans in their failure to hire such" (Ex. 2, p. 3). The record does not contain any evidence that any similarly situated employees outside of complainant's protected

classes were treated more favorably by the FBI, and there is no evidence creating an inference of discrimination.

FBI officials articulated legitimate, nondiscriminatory reasons for rescinding complainant's conditional offer of employment. FBI Manual of Investigative Operations & Guidelines Part 1: 67-8.2 Polygraph Examination of FBI Applicants requires all applicants "undergo a preemployment polygraph examination focusing on national security issues, use or sale of illegal drugs, and completeness of the Application for Employment (FD-14)" (Ex. 17). Part 67-8.2.1 Polygraph Results 6 (b) provides that applicants who...fail the initial polygraph examination... will be disqualified from further processing (ibid.). [redacted]

[redacted] Chief [redacted] said a conditional appointment offer requires applicants to pass a polygraph examination as a part of the preliminary processing. According to [redacted] the [redacted] supervisor reviews the polygraph results, identifies the code to discontinue the background investigation, and enters the code into the Bureau Personnel Management System which automatically generates a generic letter. [redacted] explained that all applicants who are unsuccessful in passing the polygraph examination are sent a letter issued by Bureau Personnel Management System. [redacted] said the Polygraph Unit (PU) advised [redacted] that complainant had two polygraph failures, so complainant's conditional offer was rescinded. b6

The evidence does not establish discrimination. The polygraph examination consists of two parts, Series I (questions related to National Security) and Series II (questions related to use and sale of illegal drugs and completeness of her application). Special Agent [redacted] administered the first polygraph examination and concluded that complainant's responses to Series I questions were not indicative of deception while her responses in Series II questions were indicative of deception (Ex. 22). Special Agent [redacted] administered the second polygraph examination which consisted of Series I questions. [redacted] concluded that complainant's responses were not indicative of deception, but when the matter was forwarded for further review, Special Agent [redacted] concluded that there was deception, and this was confirmed by Regional Polygraph Manager [redacted] (Ex. 23). b6

[redacted] said FBI practice requires that a second opinion be provided when the Regional Polygraph Manager and Quality Control reviewer disagrees with a decision reached by the polygraph examiner. The record demonstrates that [redacted] conducted the initial Quality Control reviews on complainant's polygraph examinations administered by [redacted] and [redacted] said, b6

"As the QC reviewer, my decision resulted in an overall polygraph result of DI (deception)" (Ex. 14, p. 2). [] explained that he concurred with [] conclusions, but disagreed with [] conclusion that complainant did not display deception in her responses. [] conducted a review of [] assessment and concurred that deception was indicated in complainant's second polygraph examination. FBI officials provided a reasonable explanation for rescinding the conditional offer of employment.

b6

Complainant claimed that the FBI's reasons were pretext for discrimination. Complainant said, "it has been ten years since a black female has successfully been processed through the Memphis Division to attend the [] (Ex. 3, p. 5). Complainant complained that the criteria was "preset for hiring white males" (ibid.).

b6

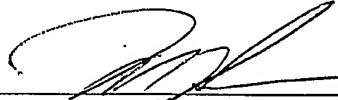
The evidence establishes that all applicants are required to take the same polygraph examination and there is no evidence that the criteria is discriminatory. According to [] "both males and females, regardless of race, perform equally on polygraph examinations" (Ex. 14, p. 3). [] testified that the race of the person being tested is not reflected on the polygraph examination. [] testified that neither race nor sex were factors in the administration or evaluation of complainant's polygraph examination.

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The record contains no evidence that complainant's conditional offer of employment was rescinded due to race or sex discrimination. The record indicates that FBI officials collectively agreed that complainant's responses had shown deception, and her conditional employment offer was rescinded on that basis. There is no evidence of discriminatory animus on behalf of management towards complainant. The record demonstrates that complainant has failed to prove that the FBI's articulated legitimate, nondiscriminatory reasons for its actions are pretextual.

Decision

The record does not support a finding that the complainant was discriminated against on the bases of race or sex.



Mark L. Gross
Complaint Adjudication Officer



Attorney
Complaint Adjudication Office

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CO

U.S. Department of Justice

Complaint of Discrimination

(see instructions on reverse)

PRIVACY ACT STATEMENT: 1. AUTHORITY-The authority to collect this information is derived from 42 U.S.C. Section 2000a-16; 29 CFR Sections 1614.106 and 1614.108.
2. PURPOSE AND USE-This information will be used to document the issues and allegations of a complaint of discrimination based on race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental), sexual orientation or reprisal.

The signed statement will serve as the record necessary to indicate an investigation will become part of the complaint file during the investigation; hearing, if any; adjudication; and appeal, if any, to the Equal Employment Commission.

3. EFFECTS OF NON-DISCLOSURE-Submission of this information is MANDATORY. Failure to furnish this information will result in the complaint being returned without action.

b6

1. Complainant's Full Name

2. Your Telephone Number (including area code)

3.

Home

Cell
-Work

3. Which Department of Justice Office Do You Believe Discriminated Against You?

FBI

4. Current Work Address

A. Name of Office Which You Believe Discriminated Against You.

Polygraph Div.

A. Name of Agency Where You Work

B. Street Address of Your Agency

B. Street Address of Office

1000 State St

City, State and Zip Code

C. City, State and Zip Code

New Haven, CT 06511

Title and Grade of Your Job

5. Date on Which Most Recent Alleged Discrimination Took Place

Month Day Year

01 | 12 | 2010

6. Check Below Why You Believe You Were Discriminated Against?

- ☒ Race or Color (Give Race or Color) _____
☐ Religion (Give Religion) _____
☐ Sex (Give Sex) ☐ Male ☐ Female
☐ Sexual Harassment
☐ Age (Give Age) _____
☐ National Origin (Give National Origin) _____
☐ Disability ☐ Physical ☐ Mental

- ☐ Sexual Orientation
☐ Reprisal
☐ Parental Status
☐ Class Complaint

7. Explain how you were discriminated against (Treated differently from other employees or applicants) Because of Your Race, Color, Religion, Sex, Age, Handicap, Reprisal, or National Origin (You may continue your answer on another sheet of paper if you need more space).

see attached

8. What Corrective Action Do You Want Taken on Your Complaint?

I would like my polygraph results changed from fail to pass and for the preliminary processing to continue.

9. A) I Have Discussed My Complaint With an Equal Employment Opportunity Counselor and/or other EEO Official:

DATE OF FIRST CONTACT WITH EEO OFFICE:

02 | 22 | 2010

DATE OF RECEIPT OF NOTICE OF FINAL INTERVIEW WITH EEO COUNSELOR

☐ I Have Not Contacted an EEO Counselor

10. Date of This Complaint:

Month Day Year

03 | 25 | 2010

Deemed filed: 3/25/10 (Fax)

b6

On January 12, 2010 I took a pre-employment polygraph for a position, with the FBI. The test was given at the FBI office in New Haven, CT.

I met with the polygrapher, [REDACTED] and he explained the process and what to expect during the exam.

At the end of the exam [REDACTED] approached me and unhooked the apparatus and asked how I thought I did. I replied by saying that although I was a little nervous I believed I did well. He then said I passed the national security portion on the polygraph but that my response about my drug use in high school [REDACTED] was showing deception. He said that he moved the question around and that no matter where he put it I had the same response when asked about it. He told me how the FBI took deception very seriously and that if I wanted to move further along in the hiring process I would have to change the number of times [REDACTED] to something other than what I indicated on my application. He approached me several times to change my answer and each time I told [REDACTED] Again, after several attempts to have me change my answer, and I didn't, he said he was sorry and that he would forward his findings to headquarters.

After reviewing the test and [REDACTED] debriefing on my ride home, I was convinced that [REDACTED] may have made an assumption, based on a stereotype about African Americans and drug use, and used that stereotype to profile me [REDACTED] I also realized that what [REDACTED] was asking of me would reflect negatively either way - if I didn't change my answer I was being deceptive and if I did change my answer I was lying on my application.

Throughout the entire process I was told by everyone I came into contact with at the FBI to be truthful and that the FBI was not looking for perfect people but honest people. [REDACTED]

[REDACTED] I was not prepared for the FBI using it as a means to possibly stereotype someone out of the hiring process.

From the beginning of the application and interview process to evaluate me for a position with the FBI no one mentioned that responding "yes" to experimental use of marijuana would eliminate me from the possibility of a position with the FBI. Therefore, being told, after my polygraph, that my answer regarding marijuana showed deception I was astonished to realize that my honesty had apparently lead to the removal of the offer to work for the FBI. This further leads me to realize that other reasons may have been the cause of my removal.

[REDACTED] I have received many letters of commendation and appreciation for my work and I have never had any disciplinary actions taken against me. I believe that none of this was taken into consideration and that I may have been judged stereotypically on my ethnic and cultural background. As a final note, I have grave concerns that the failed polygraph could sabotage any further attempts I may have of obtaining employment in the criminal justice field.

[redacted]
From: [redacted]
Sent: Tuesday, February 23, 2010 12:01 PM
To: [redacted]
Cc: [redacted]
Subject: FW: Informal Complaint

Attachments: Informal Complaint - [redacted].pdf; ATT00001..txt

b6



Informal Complaint ATT00001..txt (262
[redacted] B) [redacted]

Please refer the aggrieved to an EEO Counselor.

Thank you

[redacted]

-----Original Message-----

From: [redacted]
Sent: Monday, February 22, 2010 5:39 PM
To: [redacted]
Cc: [redacted]
Subject: FW: Informal Complaint

[redacted] could you please direct [redacted] to an EEO Counselor, Thanks [redacted]

b6

Supervisory Equal Employment Specialist
Office of EEO Affairs

[redacted]

From: [redacted]
Sent: Monday, February 22, 2010 9:47 AM
To: [redacted]
Subject: Informal Complaint

Hello [redacted]

Attached is an informal Complaint concerning my treatment at a pre-employment polygraph for a support position with the FBI.

I can be reached at:

[redacted] 8am - 4:30 pm, Mon-Fri

[redacted] after 5 pm

b6

Thank You

[redacted]

U.S. Department of Justice

Justice Management Division

Equal Employment Opportunity Staff

Washington, D.C. 20530

E-FILING CONTACT SHEET

Contact Information

Please print. Complete all fields in the contact information section.

☐ Employee

☒ Applicant

Last Name: Middle Initial:

First Name:

Responsible Agency: FBI

Occupation: Grade: Series:

Home Address: b6

City: State: Zip Code:

Home Phone:

Cell Phone:

Email Address:

Work Address:

City: State: Zip Code:

Work Phone:

Basis of Pre-Complaint of Discrimination

Check Below Why You Believe You Were Discriminated Against?

☒ Race (specify): based on stereotypes
☐ Color (specify): _____
☐ Religion (specify): _____
☐ Sex (specify): _____ Male _____ Female
☐ Sexual Harassment
☐ Age (specify): _____ Date of Birth: _____
MM/DD/YYYY
☐ National Origin (specify): _____
☐ Sexual Orientation
☐ Physical Disability (specify): _____
☐ Mental Disability (specify): _____
☐ Parental Status
☐ Reprisal

Date of the Most Recent Alleged Discriminatory Action and Nature of the Action

Date on Which Most Recent Discriminatory Took Place: 01/12/2010
MM/DD/YYYY
Date you became aware of discriminatory action: 01/12/2010
MM/DD/YYYY

Discriminatory Action: Explain How You Believe You Were Discriminated Against.

On January 12, 2010 I took a pre-employment polygraph for a position with the FBI. The test was given at the FBI office in New Haven, CT.

I met with the polygrapher, [] and he explained the process and what to expect during the exam.

b6

At the end of the exam [] approached me and unhooked the apparatus and asked how I thought I did. I replied by saying that although I was a little nervous I believed I did well. He then said I passed the national security portion on the polygraph but that my response about my drug use []

Note: Please e-mail this e-filing form to the point of contact (POC) identified on the list below. The POC must be from the component where the complaint originated.

E-Filing Contact Sheet Point of Contact (POC)

Office, Boards, and Divisions (OBD) POC:

Charles Cephas, Charles.Cephas@usdoj.gov, (202) 616-4816

Federal Bureau of Investigation (FBI) POC:

Barry Ward, Barry.Ward@ic.fbi.gov, (202) 324-2818

Bureau of Alcohol, Tobacco, and Firearms (ATF) POC:

Brenda.F.Bryant, Brenda.F.Bryant@usdoj.gov, (202) 648-7401

Federal Bureau of Prisons (BOP) POC:

Mina Raskin, Mina.Raskin@usdoj.gov, (202) 514-6165

Office of Justice Programs (OJP) POC:

Tonya Yardborough, Tonya.White@usdoj.gov, (202) 353-2562

Executive Office of United States Attorneys (EOUSA) POC:

Rita Sampson, Rita.Sampson@usdoj.gov, (202) 514-3982

Drug Enforcement Administration (DEA-US) POCs:

Stephanie R. Smith, Stephanie.R.Smith@usdoj.gov, (202) 307-9238

Donald G. Ballard, Donald.G.Ballard@usdoj.gov, (202) 307-8897

U.S. Marshals Service (USMS) POC:

Tanya Wright, Tanya.Wright@usdoj.gov, (202) 305-9419

Executive Office Immigration Review (EOIR) POC:

Andrew Press, Andrew.Press@usdoj.gov, (703) 605-1285

[redacted]
From: [redacted]
Sent: Friday, March 05, 2010 4:13 PM
To: [redacted]
Subject: RE: Informal Complaint

b6

[redacted]
I assigned this to [redacted] I will check on the status.

Thank you

[redacted]
-----Original Message-----

From: [redacted]
Sent: Friday, March 05, 2010 1:47 PM
To: [redacted]
Cc: [redacted]
Subject: Re: Informal Complaint

Hello [redacted]

I'm just checking in to see if there's anything I need to do?

b6

I haven't heard anything and was just wondering.

Thanks

[redacted]
On Feb 22, 2010, at 5:39 PM, [redacted] wrote:

> [redacted] could you please direct [redacted] to an EEO Counselor,

> Thanks, [redacted]

> [redacted]
> Supervisory Equal Employment Specialist Office of EEO Affairs

> [redacted]
> From: [redacted]
> Sent: Monday, February 22, 2010 9:47 AM

b6

> To: [redacted]
> Subject: Informal Complaint

> Hello [redacted]

> Attached is an informal Complaint concerning my treatment at a pre-
> employment polygraph for a support position with the FBI.

> I can be reached at:

> [redacted] 8am - 4:30 pm, Mon-Fri

> [redacted] after 5 pm

> Thank You

> [redacted] <Informal Complai [redacted]
> [redacted].pdf><ATT00001..txt>

b6

[redacted]
From: [redacted]
Sent: Friday, March 05, 2010 4:14 PM
To: [redacted]
Subject: FW: Informal Complaint

b6

[redacted]
Did you prepare referral to counseling letter? If so, please provide me with the date.

Thank you

[redacted]
-----Original Message-----

From: [redacted]
Sent: Friday, March 05, 2010 1:47 PM
To: [redacted]
Cc: [redacted]
Subject: Re: Informal Complaint

Hello [redacted]

b6

I'm just checking in to see if there's anything I need to do?

I haven't heard anything and was just wondering.

Thanks

[redacted]
On Feb 22, 2010, at 5:39 PM, [redacted] wrote:

> [redacted] could you please direct [redacted] to an EEO Counselor,

> Thanks, [redacted]

> [redacted]

> Supervisory Equal Employment Specialist Office of EEO Affairs

> [redacted]

>

> From: [redacted]

> Sent: Monday, February 22, 2010 9:47 AM

> To: [redacted]

> Subject: Informal Complaint

>

> Hello [redacted]

>

> Attached is an informal Complaint concerning my treatment at a pre-

> employment polygraph for a support position with the FBI.

>

> I can be reached at:

>

> [redacted] 8am - 4:30 pm, Mon-Fri

>

> [redacted] after 5 pm

>

>

> Thank You

>

> [redacted] Informal Complaint - [redacted]

b6

>[]pdf><ATT00001..txt>

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U.S. Department of Justice
Complaint Adjudication Office

RECEIVED

Agency Complaint Number [redacted]

DJ Number [redacted]

2012 APR -6 10 3:53

OFFICE OF EEO AFFAIRS
950 Pennsylvania Avenue, NW
PHB-A4810
Washington, DC 20530

APR 05 2012

b6



Dear [redacted]

This is in reference to the complaint of employment discrimination that you filed against the Federal Bureau of Investigation. Under the Department of Justice's equal employment opportunity regulations, the Complaint Adjudication Officer renders the final Department of Justice decision on your complaint. Enclosed is the final Department of Justice decision. Your rights of appeal are outlined below.

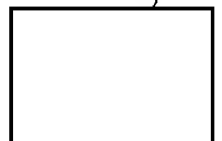
Rights of Appeal

First, you have the right to appeal any part of this decision to the Equal Employment Opportunity Commission (EEOC). You may do so by filing your appeal within 30 days of the date you receive this decision. If you are represented by an attorney of record, the 30-day appeal period shall begin to run the day your attorney receives this decision. The appeal must be in writing. The Commission prefers that you use EEOC Form 573, Notice of Appeal/Petition, a copy of which is attached, to appeal this decision. The notice of appeal should be sent to the Director, Office of Federal Operations, EEOC, Post Office Box 77960, Washington, D.C. 20013, by mail, personal delivery, or facsimile. You must also send a copy of your notice of appeal to [redacted] Acting EEO Officer, Federal Bureau of Investigation, 935 Pennsylvania Avenue, N.W., Room 7901, Washington, D.C., 20535. You must state the date and method by which you sent the copy of your notice to the agency's EEO Officer either on, or attached to, the notice of appeal you mail to the EEOC.

b6

Second, you have the right to file a civil action in the appropriate United States District Court within 90 days of the date you receive this decision. In filing your federal complaint, you should name the Attorney General, Eric H. Holder, Jr., as the defendant. Even if you appeal this decision to the EEOC, you still

9/17/12
APPEAL FOR EEOC



have the right to go to federal court. You may file a civil action in the United States District Court within 90 days of the day you receive the Commission's final decision on your appeal, or after 180 days from the date you filed your appeal with the Commission, if the Commission has not made a final decision by that time.

If you cannot afford to file a civil action, you can ask the court to allow you to file the action at no cost to you. The court may also provide you with an attorney if you cannot afford to hire one to represent you in your civil action. Questions concerning when and how to file a waiver of costs should be directed to your attorney or the District Court clerk.

Sincerely,

Mark L. Gross

Mark L. Gross
Complaint Adjudication Officer

cc:



b6

The U.S. Equal Employment Opportunity Commission

NOTICE OF APPEAL/PETITION TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OFFICE OF FEDERAL OPERATIONS
P.O. Box 77960
Washington, DC 20013

Complainant Information: (Please Print or Type)

Complainant's name (Last, First, M.I.):	
Home/mailling address:	
City, State, ZIP Code:	
Daytime Telephone # (with area code):	
E-mail address (if any):	

Attorney/ Representative Information (if any):

Attorney name:	
Non-Attorney Representative name:	
Address:	
City, State, ZIP Code:	
Telephone number (if applicable):	
E-mail address (if any):	

General Information:

Name of the agency being charged with discrimination:	
Identify the Agency's complaint number:	
Location of the duty station or local facility in which the complaint arose:	
Has a final action been taken by the agency, an Arbitrator, EEOC, or MSPB on this complaint?	<input type="checkbox"/> Yes; Date Received _____ (Remember to attach a copy) <input type="checkbox"/> No <input type="checkbox"/> This appeal alleges a breach of settlement agreement:
Has a complaint been filed on this same matter with the EEOC, another agency, or through any other administrative or collective	<input type="checkbox"/> No <input type="checkbox"/> Yes (Indicate the agency or procedure, complaint number, and attach a copy, if appropriate.)



U.S. Department of Justice
Complaint Adjudication Office

Agency Complaint Number [redacted]
DJ Number [redacted]

b6

950 Pennsylvania Avenue, N.W.
Patrick Henry Building, Suite 5300
Washington, DC 20530

APR 05 2012

DEPARTMENT OF JUSTICE FINAL AGENCY DECISION

in the matter of

[redacted] v. Federal Bureau of Investigation

b6

On March 25, 2010, complainant [redacted] a former applicant for a position as [redacted] with the Federal Bureau of Investigation (FBI), filed a complaint alleging employment discrimination on the basis of his race (African-American) pursuant to Section 717 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 (Title VII). The issue accepted for investigation is:

Whether complainant was discriminated against based on his race (African-American) when he received a letter dated January 28, 2010, advising him that his application was being discontinued at the preliminary processing stage as a result of his failed polygraph examination. (Ex. 6).

The Complaint Adjudication Office received this case on October 6, 2010, for issuance of a final Department of Justice decision.

Facts

In September 2009 complainant [redacted] applied for a position as [redacted] (Ex. 6 at 2). FBI interviewed complainant by telephone and sent him a letter extending him a conditional offer of employment as [redacted] pending a background investigation. (Ex. 9 at 2). Special Agent [redacted] administered a polygraph examination to complainant in January 2010 at the FBI's New Haven, Connecticut, Field Office. (Ex. 9 at 3).

b6

A. Complainant's Allegations

Complainant stated that he was nervous during the polygraph examination since it was his first. (Ex. 9 at 3). Complainant also said that, during the exam, he admitted using marijuana

[redacted]
[redacted] (Ex. 9 at 3). Complainant stated that, because [redacted] he provided his best estimate regarding the number of times he used the drug. (Ex. 9 at 3).

b6

After the questioning ended [redacted] told complainant that the results showed deception regarding the number of times complainant had smoked marijuana. (Ex. 9 at 4). [redacted] told complainant that complainant could change his answer regarding the number of times he smoked marijuana and be retested on the answer. (Ex. 9 at 4). Complainant declined, stating that the figure he provided was his best recollection. (Ex. 9 at 4). [redacted] then told complainant that he was sorry and that he would forward his finding to the FBI's Headquarters. (Ex. 4 at 7).

b6

Complainant stated that he became convinced that [redacted] finding of deception was based upon racial stereotypes concerning African-Americans and drug use. (Ex. 9 at 5). Complainant said that he was as honest as he could be during the exam and that his qualifications and letters of commendation had been overlooked. (Ex. 9 at 7). He further stated that he worried that this failed exam could undermine his other attempts to find employment in criminal justice. (Ex. 9 at 6).

B. Management's Response

Special Agent [redacted] said that he performed the polygraph on complainant after having conducted between 500 and 600 such examinations during his career. (Ex. 10 at 2). [redacted] stated that he knew complainant was African-American from meeting him in person. (Ex. 10 at 4). [redacted] said that complainant was amicable and professional during the process, as was [redacted] himself. (Ex. 10 at 4). Prior to conducting the polygraph, [redacted] reviewed complainant's National Security questionnaire, drug disclosure form, and Personnel Security Interview (PSI).

b6

According to [redacted] complainant's responses to the drug question indicated deception. (Ex. 10 at 3). [redacted] said that he informed complainant that the question of frequency of drug use showed deception and asked complainant if he was sure about his answers. (Ex. 10 at 3). [redacted] said that he told complainant that complainant could provide a number that complainant was

b6

comfortable with so that he could pass the polygraph. (Ex. 10 at 3). Complainant did not change his answer. (Ex. 10 at 3).

[] said he then uploaded the documents associated with complainant's examination so Supervisory Special Agent (SSA) [] could conduct a Quality Control Review of the results. (Ex. 10 at 3). [] stated that [] concurred with [] conclusion that complainant's responses concerning drug use indicated deception. (Ex. 10 at 3).

b6

Supervisory Special Agent [] said that he had worked as Regional Polygraph Program Manager since May 2008 and had been a polygrapher since 1997. (Ex. 11 at 2). [] explained that he conducted a blind review of complainant's polygraph results. (Ex. 11 at 2-3). [] explained that the blind review meant that [] reached his own conclusion regarding polygraph results without knowing the results reached by the polygrapher who administered the examination. (Ex. 11 at 3). [] then compared the results and his conclusion matched [] (Ex. 11 at 3, 4). [] forwarded his conclusion into a system that generated a letter to complainant informing him that no further action would be taken regarding his application. (Ex. 11 at 5).

b6

[] stated that the only personal information available to him when conducting the review was complainant's name, date of birth, social security number, gender, height, weight, and address. (Ex. 11 at 3).

C. Documentary Evidence

The record includes complainant's drug disclosure form; the polygraph report; a letter dated January 28, 2010, from [] Chief of the Polygraph Unit, advising complainant that because he failed the polygraph stage, no further action could be taken regarding his application; and FBI policies concerning polygraph examinations and pre-employment screening. Also included in the file is a memorandum stating that, from October 1, 2008 through June 1, 2010, applicants rejected due to failure to pass a polygraph had the following racial backgrounds: 2,130 with race unknown, 74 white, 25 African-American, 15 Asian, 13 Hispanic, 2 American Indian/Alaskan national origin, and 1 Hawaiian/Pacific Islander.

b6

Analysis

Title VII protects federal employees from discrimination on the basis of race. 42 U.S.C. § 2000e-16. In the absence of direct evidence of discrimination, the Supreme Court has

established a three-step process for establishing the parties' burdens of proof in disparate treatment cases. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). First, the record must show by a preponderance of the evidence that a prima facie case for discrimination exists by representing such facts that, if unexplained, reasonably give rise to an inference of discrimination. Id. Second, if the record establishes a prima facie case, the employer must articulate a legitimate, nondiscriminatory reason for its actions. Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-56 (1981). Third, the record must demonstrate by a preponderance of the evidence that the legitimate, nondiscriminatory reasons articulated by the employer are a pretext for discrimination. Id. at 255-56.

Here, FBI has sufficiently articulated legitimate, nondiscriminatory reasons for rejecting complainant's application for employment. The record indicates that FBI's requirement of a polygraph examination that includes questions concerning prior drug use is a race-neutral screening process. [REDACTED] statements concerning his blind review of complainant's polygraph results indicate that FBI has established a second layer of review to guarantee the authenticity of results. In his review, [REDACTED] had no information concerning complainant's race. b6

The record contains no evidence that either [REDACTED] or [REDACTED] considered complainant's race in reaching their conclusions. Aside from complainant's conclusion that [REDACTED] finding of deception was based upon racial stereotypes, complainant did not identify any actions or statements by [REDACTED] or any other FBI employee showing racial bias. Nothing indicates that any FBI employee harbored an animus based upon race or that complainant was treated differently from similarly situated employees outside his protected status. Given the absence of any indication that FBI's actions had a discriminatory motive, complainant's claim of discrimination is denied.

Decision

The evidence does not support complainant's allegation that he was discriminated against based on his race when he received a letter dated January 28, 2010, advising him that his application was being discontinued at the preliminary processing stage

-5-

because he failed a polygraph examination.



Mark L. Gross
Complaint Adjudication Officer



Attorney
Complaint Adjudication Office

b6

Complaint of Discrimination

(See instructions on reverse)

PRIVACY ACT STATEMENT: 1. AUTHORITY: The authority to collect this information is derived from 42 U.S.C. Section 2000e-16; 29 CFR Sections 1614.106 and 1614.108. 2. PURPOSE AND USE: This information will be used to document the issues and allegations of a complaint of discrimination based on race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental), sexual orientation or reprisal.

The signed statement will serve as the record necessary to initiate an investigation and will become part of the complaint file during the investigation; hearing, if any; adjudication; and appeal, if one, to the Equal Employment Opportunity Commission. 3. EFFECTS OF NON-DISCLOSURE: Submission of this information is MANDATORY. Failure to furnish this information will result in the complaint being returned without action.

1. Complainant's Full Name [Redacted]	2. Your Telephone Number (including area code) Home [Redacted] Work [Redacted]
Street Address, RD Number, or Post Office Box Number [Redacted]	
City, State and Zip Code [Redacted]	

3. Which Department of Justice Office Do You Believe Discriminated Against You?

Federal Bureau of Investigation Jackson, MS

B. Street Address of Office

1220 Echelon Parkway
C. City, State and Zip Code

Jackson, MS 39213

5. Date on Which Most Recent Alleged Discrimination Took Place

Month	Day	Year
02	10	2010

6. Check Below Why You Believe You Were Discriminated Against?

- ☒ Race or Color (Give Race or Color) Black
- ☐ Religion (Give Religion) _____
- ☐ Sex (Give Sex) ☐ Male ☐ Female
- ☐ Sexual Harassment
- ☐ Age (Give age) _____
- ☐ National Origin (Give National Origin) _____
- ☐ Disability ☐ Physical ☐ Mental

- ☐ Sexual Orientation
- ☒ Reprisal
with 8 weeks in Jackson Office
- ☐ Parental Status
- ☐ Class Complaint

7. Explain How You Believe You Were Discriminated Against (treated differently from other employees or applicants) Because of Your Race, Color, Sex (including sexual harassment), Religion, National Origin, Age, Disability (physical or mental), Sexual Orientation, Parental Status, or Reprisal. Do not include specific issues or incidents that you have not discussed with your EEO Counselor. (You may continue your answer on another sheet of paper if you need more space.)

I have been discriminated against due to race as I was treated differently and unfairly than my co-applicant who is white. We both had phones at the application process at the same time and he was allowed to have assistance during the PFT when I was not provided the same benefit. I was also not allowed to have the same person give my polygraph as he did. I was forced to drive to Mobile, AL for a polygraph and was denied any re-imbursement for my travel expenses and time off from work. I feel that I have been the victim of polygraph manipulation as there were several inconsistencies during my polygraphs as well as several unprofessional and inappropriate remarks made including accusations of illegal drug use as well as several references to and questions related

8. What Corrective Action Do You Want Taken on Your Complaint?

I would like to be compensated for the career of [Redacted] of which I was wrongfully denied. I would also like disciplinary action taken against the FBI employees involved [Redacted]

9. A) I have discussed my complaint with an Equal Employment Opportunity Counselor and/or other EEO Official. B) Name of Counselor: [Redacted]

DATE OF FIRST CONTACT WITH EEO OFFICE:

02 | 18 | 2010

DATE OF RECEIPT OF NOTICE OF FINAL INTERVIEW WITH EEO COUNSELOR:

03 | 02 | 2010

☐ I Have Not Contacted an EEO Counselor

10. Date of This Complaint:

Month Day Year

03 | 05 | 2010

11. Sign Your Name Here:

[Redacted Signature]

Deemed filed 3/5/10 (Postmark)

MPL
3/11/10FORM DOJ-201A
MAR. 2001CAB
3/11/10

WV



U.S. Department of Justice
Complaint Adjudication Office

EEOC Number [redacted]
Agency Complaint No. [redacted]
DJ Number [redacted]

950 Pennsylvania Ave, NW
Patrick Henry Building, Room A4810
Washington, DC 20530

OCT 12 2011

b6



Dear [redacted]

This is in reference to the complaint of discrimination that you filed against the Federal Bureau of Investigation. Enclosed is the Department of Justice's Final Order and Memorandum Explaining the Final Order. The Department of Justice agrees with the Administrative Judge's decision that you were not subjected to unlawful discrimination.

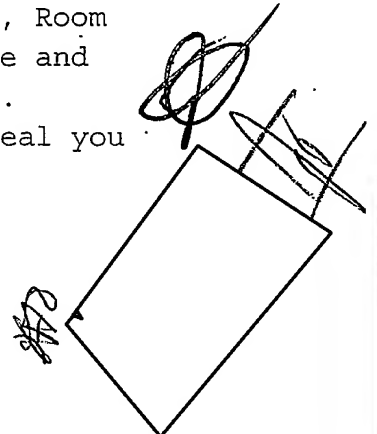
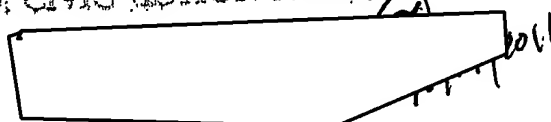
RECEIVED
2011 OCT 14 A 11:57
OFFICE OF EEO AFFAIRS

Rights of Appeal

First, you have the right to appeal the decision to the Equal Employment Opportunity Commission (EEOC). You may file your appeal of the claim within 30 days of the date you receive this decision. If you are represented by an attorney of record, the 30-day appeal period shall be to run the day your attorney receives this decision. The appeal must be in writing. The Commission prefers that you use EEOC Form 573, Notice of Appeal/Petition, a copy of which is attached, to appeal this decision. The notice of appeal should be sent to Carlton Hadden, Director, Office of Federal Operations, EEOC, Post Office Box 77960, Washington, D.C., 20013, by mail, personal delivery, or facsimile. You must also send a copy of your notice of appeal to [redacted] Unit Chief, Federal Bureau of Investigation, 935 Pennsylvania Avenue, N.W., Room 7947, Washington, D.C., 20535. You must state the date and method by which you sent the copy of your notice to Mr. [redacted] either on, or attached to, the notice of appeal you mail to the EEOC.

b6

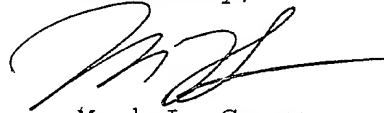
SET. ACKLER TO CLOSE BY 1/20/11 IF NO
APPEAL OR CIVIC ACTION FILED



Second, you have the right to file a civil action in the appropriate United States District Court within 90 days of the date you receive this decision. In filing your federal complaint, you should name Attorney General Eric H. Holder, Jr., as the defendant. Even if you appeal this decision to the EEOC, you still have the right to go to federal court. You may file a civil action in the United States District Court within 90 days of the day you receive the Commission's final decision on your appeal, or after 180 days from the date you filed your appeal with the Commission, if the Commission has not made a final decision by that time.

If you cannot afford to file a civil action, you can ask the court to allow you to file the action at no cost to you. The court may also provide you with an attorney if you cannot afford to hire one to represent you in your civil action. Questions concerning when and how to file a waiver of costs should be directed to your attorney or the District Court clerk.

Sincerely,



Mark L. Gross

Complaint Adjudication Officer

Cc:



Frances del Toro

b6

The U.S. Equal Employment Opportunity Commission

NOTICE OF APPEAL/PETITION
TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OFFICE OF FEDERAL OPERATIONS

P.O. Box 77960

Washington, DC 20013

Complainant Information: (Please Print or Type)

Complainant's name (Last, First, M.I.):	
Home/mailling address:	
City, State, ZIP Code:	
Daytime Telephone # (with area code):	
E-mail address (if any):	

Attorney/ Representative Information (if any):

Attorney name:	
Non-Attorney Representative name:	
Address:	
City, State, ZIP Code:	
Telephone number (if applicable):	
E-mail address (if any):	

General Information:

Name of the agency being charged with discrimination:	
Identify the Agency's complaint number:	
Location of the duty station or local facility in which the complaint arose:	
Has a final action been taken by the agency, an Arbitrator, FLRA, or MSPB on this complaint?	<input type="checkbox"/> Yes; Date Received _____ (Remember to attach a copy) <input type="checkbox"/> No <input type="checkbox"/> This appeal alleges a breach of settlement agreement
Has a complaint been filed on this same matter with the EEOC, another agency; or through any other administrative or collective	<input type="checkbox"/> No <input type="checkbox"/> Yes (Indicate the agency or procedure, complaint/docket number, and attach a copy, if appropriate)



U.S. Department of Justice
Complaint Adjudication Office

EEOC No. [redacted]
Agency Complaint No. [redacted]
DJ Number [redacted]

b6

950 Pennsylvania Ave, NW
Patrick Henry Building, Room A4810
Washington, DC 20530

OCT 12 2011

DEPARTMENT OF JUSTICE FINAL ORDER

in the matter of

[redacted] v. Federal Bureau of Investigation

b6

Based on a review of the record in this case, the Department of Justice accepts the Administrative Judge's decision that the complainant was not discriminated against, pursuant to Section 717 of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000-16 (Title VII).

Mark L. Gross
Complaint Adjudication Officer
Department of Justice



U.S. Department of Justice
Complaint Adjudication
Office

Agency Complaint No. [redacted]
EEOC No. [redacted]
DJ Number [redacted]

b6

950 Pennsylvania Ave, NW
Patrick Henry Building, Room A4810
Washington, DC 20530

DEPARTMENT OF JUSTICE MEMORANDUM

OCT 12 2011

Explaining the Final Order

in the matter of

[redacted] v. Federal Bureau of Prisons

b6

29 C.F.R. § 1614.110 provides that when an Administrative Judge has issued a decision, the Department of Justice shall issue a final order notifying the complainant whether the agency will implement the Administrative Judge's decision. In this case, the Administrative Judge's finding that complainant was not discriminated against based upon his race or is supported by the record. In explaining how the decision was reached, the Administrative Judge correctly stated the facts, identified the proper issues, and correctly applied the legal standards in evaluating complainant's allegation that he was subjected to race-based discrimination when, on January 19, 2010, and February 10, 2010, he was required to participate in two polygraph examinations and was subjected to inappropriate conduct by two separate polygraph examiners, and when his application for a Special Agent position was rejected because he failed multiple polygraph examinations.

Upon our independent review of the record, we further note that complainant has also failed to state a claim of reprisal based upon [redacted]

b6

To establish a prima facie case of retaliation under Title VII, complainant must show (1) he engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Sharifi v. Dep't of Veterans Affairs, EEOC App. No. 0120065217 (June 23, 2008) (citing Whitmire, EEOC App. No. 01A00340). Here, complainant has not alleged that he or his wife engaged in any prior EEO activity. Thus, complainant's retaliation claim must fail.

For these reasons, the Department of Justice accepts the Administrative Judge's decision and enters a final order acknowledging that the Administrative Judge's decision will be fully implemented.



Mark L. Gross
Complaint Adjudication Officer



b6

Attorney
Complaint Adjudication Office

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington Field Office
131 M Street, N.E.
Washington, D.C. 20507

Complainant,

v.

Eric Holder, Attorney General,
U.S. Department of Justice,
Agency.

EEOC No. _____

Agency No. _____

b6

Date: September 7, 2011


ORDER ENTERING JUDGMENT

For the reasons set forth in the enclosed Decision dated September 7, 2011, judgment in the above-captioned matter is hereby entered. A Notice To The Parties explaining their appeal rights is attached.

This office is also enclosing a copy of the hearing record and the Report of Investigation for the Agency.

It is so ORDERED.

For the Commission:



Frances del Toro
Administrative Judge

Enclosures

b6

9-27-2011
1
BC
DA-910

CERTIFICATE OF SERVICE

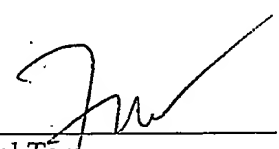
For timeliness purposes, it shall be presumed that the parties received the foregoing documents within five (5) calendar days after the date they were sent *via* first class mail. I certify that on September 7, 2011, the foregoing documents were sent *via* first class mail to the following:



b6

Office of the General Counsel
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Room PA-400N
Washington, DC 20535

Mark L. Gross
Complaint Adjudication Office
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Civil Rights Division, CAO, PHB
Washington, DC 20530



Frances del Toro
Administrative Judge

Washington, D.C. 20507

application for a [] was rescinded because he failed multiple polygraph examinations.

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Complainant has satisfied the procedural prerequisites for a hearing, but the evidence does not warrant one. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). I find that Complainant has not shown that there are any issues requiring a hearing and therefore, it is appropriate to issue summary judgment in favor of the Agency.

ANALYSIS

To establish a *prima facie* case of disparate treatment, Complainant may demonstrate that he was treated less favorably than a similarly situated employee outside of his protected group. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978). Absent comparative data, Complainant may also establish a *prima facie* case by setting forth sufficient evidence to create an inference of discrimination. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981), n. 6; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

If Complainant establishes a *prima facie* case of discrimination, the burden then is on the Agency to articulate a legitimate, nondiscriminatory reason for its challenged actions. *See Burdine*, 450 U.S. at 252-54; *McDonnell Douglas Corp.* 411 U.S. at 802. If the Agency does so, the *prima facie* inference drops from the case. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507, 510-11 (1993). Complainant then has to prove by a preponderance of the evidence that the proffered explanation is a pretext for unlawful discrimination. *See Hicks*, 509 U.S. at 511; *Burdine*, 450 U.S. at 252-53; *McDonnell Douglas*, 411 U.S. at 804. Complainant always retains the ultimate burden of persuading the trier of fact that the Agency unlawfully discriminated

against him. See *Hicks*, 509 U.S. at 511; *United States Postal Service Bd. of Governors v.*

Aikens, 460 U.S. 711, 715 (1983)

I hereby reference the material facts found in the ROI. As previously stated, I find that there are no *genuine* issues of *material* fact or credibility that require resolution at a hearing. Accordingly, summary judgment in favor of the Agency is appropriate for the following reasons. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[redacted] (White), Unit Chief, Polygraph Unit, Internal Security Section, Security Division, FBI, stated that all FBI [redacted] candidates, are required to take and pass a polygraph examination. [redacted] indicated that a polygraph test consists of two sets of questions, one set which focuses on the applicant's suitability and lifestyle (which include questions related to use of illegal substances) and a set of questions which target national security issues. According to [redacted] all the polygraph test questions are the same for all applicants. In addition, [redacted] attested that, analogous to Complainant's case, if a test result is determined to be inconclusive after undergoing Quality Control, the candidate is re-tested on a subsequent date. b6

[redacted] acknowledged that Polygrapher [redacted] declined to conduct Complainant's polygraph examination. [redacted] explained that [redacted] declined to conduct the test because [redacted] b6

[redacted] stated that [redacted] decision was standard practice and appropriate under the circumstances, as [redacted] had a conflict of interest [redacted]

[redacted]

[redacted] (White), the Polygrapher who substituted [redacted] stated that she administered Complainant four sets of questions and that in each series the first asking was determined to be "Indicative of Deception." According to [redacted] the determination is most likely attributed to the ruling of "Inconclusive" by FBI Headquarters' Quality Control. [redacted] further added that Complainant's second set of questions appeared to be "Inconclusive" and the two subsequent sets appeared to be "Not Indicative of Deception." [redacted] indicated that Complainant's "No Deception Indicated" results were overturned by FBI Headquarters' Quality Control and that the results were determined to be "Inconclusive." [redacted] indicated that an applicant's racial information is not included on the reports sent to FBI Headquarters' Quality Control.

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Polygraphers [redacted] (White) and [redacted] (Black) concluded that Complainant's subsequent polygraph test results were indicative of deception with respect to questions related to illegal substances. Moreover, [redacted] attested that their results were verified by FBI Headquarters' Quality Control. Lastly, [redacted] authorized the discontinuation of Complainant's job application due to his failure to successfully complete the preliminary processing stage regarding his background investigation.

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As the Agency has articulated legitimate, non-discriminatory reasons for its actions, the burden now shifts to Complainant to demonstrate that there is a genuine dispute as to whether the Agency's proffered reasons are a mere pretext for discrimination. Complainant, however, has failed to present substantive evidence to refute the Agency's articulation. Further, I find that other than Complainant's uncorroborated assertions, the record is devoid of any evidence that the Agency's actions were based on discriminatory animus. In fact, none of the witnesses who provided affidavits or had first-hand knowledge of the incidents before me attested that the

results of the polygraph tests were incorrect or that the Polygraphers improperly influenced the examinations. I note that Complainant did not fail one, but two polygraph tests where the examiners reached the same conclusions. Moreover, the results were verified at all times by FBI Headquarters' Quality Control.

Conclusory assertions that the Agency's intentions and motivations are questionable are not enough to withstand a summary judgment motion. *Goldberg v. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1987); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985); *Schwapp v. Town of Avon*, 118 F.3d 106, 111 (2d Cir. 1997). I note that "[e]mployers generally have broad discretion to set policies and carry out personnel decisions and should not be second guessed by a reviewing authority absent evidence of unlawful motivation." *Holley v. Dep't of Veterans Affairs*, EEOC Request No. 05950842 (November 13, 1997). Here, there is no evidence that the Agency's actions were based upon an unlawful discriminatory motive. Accordingly, because Complainant has not created a genuine issue of material fact with regard to the Agency's articulated reasons, I find that Complainant's allegation of disparate treatment cannot survive summary judgment.

DECISION

For the foregoing reasons, and in the absence of any evidence indicating that the Agency's actions were discriminatorily motivated, I find that Complainant's claims of discrimination cannot survive Summary Judgment.

SO ORDERED.



Frances del Toro
Administrative Judge

NOTICE

This is a decision by an Equal Employment Opportunity Commission Administrative Judge issued pursuant to 29 C.F.R. § 1614.109(b), 109(g) or 109(i). **With the exception detailed below, the complainant may not appeal to the Commission directly from this decision.** EEOC regulations require the Agency to take final action on the complaint by issuing a final order notifying the complainant whether or not the Agency will fully implement this decision within forty (40) calendar days of receipt of the hearing file and this decision. The complainant may appeal to the Commission within thirty (30) calendar days of receipt of the Agency's final order. The complainant may file an appeal whether the Agency decides to fully implement this decision or not.

The Agency's final order shall also contain notice of the complainant's right to appeal to the Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for such appeal or lawsuit. If the final order does not fully implement this decision, the Agency must also simultaneously file an appeal to the Commission in accordance with 29 C.F.R. § 1614.403, and append a copy of the appeal to the final order. A copy of EEOC Form 573 must be attached. A copy of the final order shall also be provided by the Agency to the Administrative Judge.

If the Agency has *not* issued its final order within forty (40) calendar days of its receipt of the hearing file and this decision, the complainant may file an appeal to the Commission directly from this decision. In this event, a copy of the Administrative Judge's decision should be attached to the appeal. The complainant should furnish a copy of the appeal to the Agency at the same time it is filed with the Commission, and should certify to the Commission the date and method by which such service was made on the Agency.

All appeals to the Commission must be filed by mail, personal delivery or facsimile to the following address:

Director
Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036
Facsimile (202) 663-7022

Facsimile transmissions over 10 pages will not be accepted.

COMPLIANCE WITH AN AGENCY FINAL ACTION

An Agency's final action that has not been the subject of an appeal to the Commission or civil action is binding on the Agency. *See* 29 C.F.R. § 1614.504. If the complainant believes that the Agency has failed to comply with the terms of its final action, the complainant shall notify the Agency's EEO Director, in writing, of the alleged noncompliance within thirty (30) calendar days of when the complainant knew or should have known of the alleged noncompliance. The Agency shall resolve the matter and respond to the complainant in writing. If the complainant is not satisfied with the Agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the Agency has complied with the terms of its final action. The complainant may file such an appeal within thirty (30) calendar days of receipt of the Agency's determination or, in the event that the Agency fails to respond, at least thirty-five (35) calendar days after complainant has served the Agency with the allegations of noncompliance. A copy of the appeal must be served on the Agency, and the Agency may submit a response to the Commission within thirty (30) calendar days of receiving the notice of appeal.

U.S. Department of Justice

Complaint of Discrimination

(see instructions on reverse)

PRIVACY ACT STATEMENT: 1. AUTHORITY-The authority to collect this information is derived from 42 U.S.C. Section 2000e-16; 29 CFR Sections 1614.106 and 1614.108.

2. PURPOSE AND USE-This information will be used to document the issues and allegations of a complaint of discrimination based on race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental), sexual orientation or reprisal.

The signed statement will serve as the record necessary to indicate an investigation will become part of the complaint file during the investigation; hearing, if any; adjudication; and appeal, if one, to the Equal Employment Commission.

3. EFFECTS OF NON-DISCLOSURE-Submission of this information is MANDATORY. Failure to furnish this information will result in the complaint being returned without action.

OFFICE OF EEO AFFAIRS

1. Complainant's Full Name

2. Your Telephone Number (including area code)

Street Address, RD Number, or Post Office Box Number

Home

City, State and Zip Code

Work

3. Which Department of Justice Office Do You Believe Discriminated Against You?

Professional Support Clearance Unit/ Polygraph Examiner

4. Current Work Address

A. Name of Office Which You Believe Discriminated Against You.

A. Name of Agency Where You Work

Professional Support Clearance Unit/ Polygraph Examiner

B. Street Address of Your Agency

B. Street Address of Office
1970 E. Parham Rd.

City, State and Zip Code

C. City, State and Zip Code

Title and Grade of Your Job

Richmond, VA 23228

5. Date on Which Most Recent Alleged Discrimination Took Place

6. Check Below Why You Believe You Were Discriminated Against?

☒ Race or Color (Give Race or Color) African American☐ Sexual

Orientation

Month Day Year

☐ Religion (Give Religion)☐ Sex (Give Sex) ☐ Male ☐ Female☐ Reprisal☐ Sexual Harassment☐ Age (Give Age) ☐ Parental Status☒ National Origin (Give National Origin) West Oakland CA☐ Disability☐ Physical☐ Mental☐ Class Complaint

7. Explain how you were discriminated against (Treated differently from other employees or applicants) Because of Your Race, Color, Religion, Sex, Age, Handicap, Reprisal, or National Origin (Use space).

On April 27, 2009 I reported to the Richmond, VA field office as required for a polygraph exam as a condition of employment with FBI. It was during this time that the policies of fair EEO practices was not followed. My dignity and integrity was violated due to the fact that the polygraph examiner overstepped boundaries in an attempt to criminalize me and paint a false picture that was not of my true character. This was done methodically and deliberately excluding me of an equal employment opportunity with the Federal Bureau of Investigation. Therefore, this grievance is based on race and national origin.

8. What Corrective Action Do You Want Taken on Your Complaint?

Deemed filed 6/10/09 (postmark)

RAH
6/18/09 JMN

I would like my application reinstated to the next step in the hiring process and for disciplinary action to take place against the polygraph examiner.

9. A) I Have Discussed My Complaint With an Equal Employment Opportunity Counselor and/or other B. Name of Counselor:

EEO Official:

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DATE OF FIRST CONTACT WITH DATE OF RECEIPT OF NOTICE OF FINAL
EEO OFFICE: 05/11/2009 INTERVIEW WITH EEO COUNSELOR

☐ I Have Not
Contacted an
EEO Counselor

06-08-2009
10. Date of This Complaint:
Month Day Year
06/08/2009

11. Sign Your (Complainant's) Name Here:

FORM DOJ-201A

MAR. 2001

READ CAREFULLY

- This form should be used only if you, as an applicant for Federal Employment or as a Federal Employee, think you have been discriminated against because of race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental), sexual orientation, parental status or reprisal by a FEDERAL agency, and have presented the matter for informal resolution to an Equal Employment Opportunity (EEO) Counselor within 45 calendar days of the date the incident occurred or, if a personnel action, within 45 calendar days of its effective date.
- Your complaint must be filed within 15 calendar days of the date of your receipt of the Notice of Final Interview with the EEO Counselor. If the matter has not been resolved to your satisfaction within 30 calendar days of you contacted the EEO Office and the final counseling interview has not been completed within that time, you have the right to file a complaint at any time thereafter up to 15 calendar days after your receipt of the Notice of Final Interview. These time limits will only be extended under limited circumstances.
- The EEO Counselor or the EEO Officer will assist you in preparing your complaint, upon request.
- Your written complaint should be filed by you with the EEO Officer for the Bureau where the alleged discrimination occurred.
- You may have a representative at all stages of the processing of your complaint.
- You will have an opportunity to talk with an impartial investigator and present all the facts which you believe support your complaint of discrimination.
- After the investigation of your complaint has been completed, you will be furnished a copy of the investigative file. You will then be given an opportunity to request a final agency decision by the Department of Justice's Complaint Adjudication Officer (CAO) or a hearing before the Equal Employment Opportunity Commission (EEOC), which will be conducted by an Administrative Judge of the EEOC. At the hearing, which will be held at a convenient time and place, you may present witnesses and other evidence in your behalf.
- If your complaint is based upon sexual orientation or parental status, your investigative file will be reviewed by the Department of Justice's CAO and a final decision will be rendered with no entitlement for further administrative review.
- If a hearing is held on your complaint, the CAO will take final action on your complaint by issuing a final order. The final order will notify you whether or not the agency will fully implement the Administrative Judge's decision and it will explain your appeal rights. If you elect to have an immediate final agency decision without having a hearing, the CAO will take final action on your

complaint by issuing a final agency decision which consists of findings on the merits of each issue in the complaint. The final agency decision will also include an explanation of your appeal rights.

- If you are not satisfied with the final order or agency decision, you have the right to file a written appeal with the EEOC, Washington, DC, within 30 calendar days after your receipt of the final order or final agency decision. A copy of your appeal must be provided to the agency at the same time it is filed with the EEOC.

- If your complaint is based on race, color, sex (including sexual harassment), religion, national origin, age, disability (physical or mental) or reprisal, you also have the right to file a civil action in the appropriate Federal District Court:

- (a) Within 90 days of receipt of the final action on an individual or class complaint if no appeal has been filed;
- (b) Within 180 days of filing an individual or class complaint if an appeal has not been filed and final action has been taken;
- (c) Within 90 days of receipt of the Commission's final decision on appeal; or
- (d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

NOTE: Special statutory provisions (PL 93-259) relating to the right to file a civil action apply to age discrimination complaints. Please consult with your EEO Officer for assistance.



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June 8, 2009

Equal Employment Opportunity Officer
Federal Bureau of Investigation
Room 7901
935 Pennsylvania Avenue, Northwest
Washington, D.C. 20535-0001

RECEIVED
2009 JUN 17 1 P 2:44
OFFICE OF EEO AFFAIRS

To whom it may concern:

This is to advise you that I am filing a grievance against the decision to rescind the conditional job offer of the FBI based on unfair EEO practices.

On April 27, 2009 I reported to the Richmond, VA field office as required for a polygraph exam as a condition of employment with FBI. It was during this time that the policies of fair EEO practices was not followed. My dignity and integrity was violated due to the fact that the polygraph examiner overstepped boundaries in an attempt to criminalize me and paint a false picture that was not of my true character. This was done methodically and deliberately excluding me of an equal employment opportunity with the Federal Bureau of Investigation. Therefore, this grievance is based on race and national origin.

Before the examination began, I was asked to read and sign a disclosure of what was to take place during the polygraph exam. After reading the exam disclosure statement that read, the exam would be video taped and recorded I was told by the examiner there would not be a camera or recorder present. In the back of my mind, I felt that this could become a potential problem. My eagerness to proceed in the hiring process alone with the fact that I had nothing to hide, I continued.

The examiner began by asking me questions that were personal questions about my upbringing and personal values which seemed to be within the scope of his job. However, the more I answered questions [redacted] the more he kept making comments and referring to how the FBI could not just hire people that were not of high moral standards and integrity. [redacted] I know all about being of high standards and integrity. The comments were totally unscripted and I felt as if his comments about the type of people that should be allowed in the FBI was being directed towards me but I still wanted to give the benefit of the doubt and just proceeded with the exam.

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I answered all of the initial questions honestly but could not help but notice the negative

undercurrent that was swelling against me. The examiner covered the polygraph equipment and the questions that I would be asked while hooked up to the equipment. I did not have a problem with the questions because I was positive that I would be able to answer truthfully and pass with flying colors. The time finally came to start the exam and I was uncomfortable with this gentlemen but I was hopeful that he would be professional.

He began to ask me the test questions which was consistent with the ones we practiced. I was prompted to reply with a yes or no answer. I answered each and every question truthfully to reflect my past as it related to the questions asked. The examiner asked the same questions over and over and I answered the questions honestly each and every time while following all instructions. After some time, I could sense my fears were coming to reality and would be at the mercy of this man who was operating without any checks and balances. He told me that I was having a little problem with one question. He then proceeded to tell me that he was going to change up a few of the test questions and test me again. He asked me the test questions several times. Once again, I answered each question truthfully.

At the conclusion of a long series of asking me the test questions, I was instructed to stop. The Examiner seemed to be visibly upset and displeased with me. He walked around the table he was sitting at and pulled a chair up right in front of me while I was still hooked up to the equipment invading my personal space. He said "Look, I'm going to tell you the question your not passing is the drug question. Have you ever used drugs or sold drugs?" I was dumbfounded because that was the question I had the most confidence in by answering no! I said "I have never used or sold drugs." Before I could finish my statement, he stopped me. Then proceeded to try and put word in my mouth by saying, "What happened is that you may have used drugs one time or had some early drug usage in your life."

I replied, "No I have never used drugs or sold drugs in my life." He was very upset by this time and told me to stop saying that because I was painting myself in a corner that I could not get out of. He would not except that answer as the truth and at this time I felt as if it was not about what the reading showed on the polygraph equipment but more about the personal feelings of examiner. My demographic background, ethnicity and upbringing, seemed to be a problem for him. So I looked him directly in the eyes and stated, "Where I grew up yes, I saw others abuse and sale drugs but I never used or sold them." He stated, "That is the problem with you guys." He then unhooked the polygraph equipment and threatened me with the job by saying I didn't pass the test twice.

Presented with the possibility of having my dreams and hopes of continuing my service to this country in the Federal Bureau Investigation my mind began to race and a great deal of stress was placed on me. He said to me, "Look you have to just get things off the table so we can move pass this." I knew he wanted me to say I used drugs before, but I could not give him what he wanted because I never used drugs. I quoted the drug policy to him that if you used marijuana over three year ago or used other substance like cocaine over 10 years ago, all you have to do is disclose it at the beginning. I wanted to inform him that I was aware of the FBI policies and would have disclosed any past usage if that was the truth.

Subsequently, he just continued to hammer away with statements that had no merit or

true basis behind them. [REDACTED]

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[REDACTED] He told me that I failed the test twice and he was not going to be able to test me again that day. Also in order to keep the process going I needed to get some things off the table and do a 86c statement. I really did not have anything of significance to add but I was told to think of anything back through my whole life in which I could not think of one time I have ever used or sold drugs.

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The examiner told me to give a written account of the event on a 86c which he had readily available. [REDACTED]

[REDACTED] So I told him that this is an insult to my integrity and drug usage or drug sales was and is something I am strongly opposed to. [REDACTED]

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The FBI claims to have a zero tolerance for discrimination, however my experience was totally the opposite on this particular day. My decision to file a EEO complaint pains me deeply. I was selected for the position because of my professional experiences. I was able to again show myself among many applicants to be worthy of a job offer given a fair opportunity. I can not let

one man's backwards thinking deny me the opportunity to reach my full potential. I am confident that once the facts are reviewed by an independent entity the truth will come to the light.

Sincerely,



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KEY POINTS

- * There were no checks and balances because the examination was not videotaped or audio recorded. Therefore, the polygraph examiner could operate in an inappropriate manner.
- * The comments the polygraph examiner was making during the interview portion of the exam were deliberate, settled and unscripted in order to send a message to me. The message was he decided who is eligible to be hired in the FBI.
- * I was not given the same opportunity that other applicants were given because policies were not followed.
- * The polygraph examiner used the threat of the FBI job offer to coerce me into a false admission. Moreover, the admission was not something to be disqualified for by FBI policies and was just a childhood memory.
- * Invaded my personal space and made comments about my past behavior that was totally untrue or without merit, thus painting a false picture of me in order to lower my score on the exam so I would not be selected.
- * The polygraph examiner said that I failed the exam, but I would be called back for a retest. However, I did not fail the exam and was telling the truth.

NOTICE OF RIGHT TO FILE A DISCRIMINATION COMPLAINT

SUBJECT: NOTICE OF RIGHT TO FILE A DISCRIMINATION COMPLAINT

FROM: EEO Counselor [redacted] **DATE:** 5/29/2009
b6
TO: [redacted]
(Name of Person Counseled)

This is to inform you that because the matter you brought to my attention has not been resolved to your satisfaction, you are now entitled to file a discrimination complaint based on race, color, religion, sex, national origin, physical or mental handicap, age, sexual orientation and/or reprisal. If you file a complaint, it must be in writing, signed, and filed, in person or by mail within 15 calendar days after receipt of this notice.

You will be provided a form (DOJ 201-A) for filing your complaint. If filed by mail, it must be done through the U.S. Post Office Department since the postmark is used to determine the date filed. The internal FBI mailing system is not acceptable. It is preferred that the complaint be filed with the Bureau's Equal Employment Opportunity Officer; however, any of the following officials are authorized to receive discrimination complaints:

Equal Employment Opportunity Officer
Federal Bureau of Investigation
Room 7901
935 Pennsylvania Avenue, Northwest
Washington, D.C. 20535-0001

Black Affairs Program Manager
or
Federal Women's Program Manager
or
Hispanic Employment Program Manager
or

Selective Placement Program Manager
(These individuals are located at the same address as listed above for the FBI's EEO Officer.)

Director
Federal Bureau of Investigation
Room 7176
935 Pennsylvania Avenue, Northwest
Washington, D.C. 20535-0001

Special Agent in Charge

Field Office
Field Office Address

Director, Equal Employment Opportunity
(Assistant Attorney General for Administration)
U.S. Department of Justice
10th & Constitution Avenue, Northwest
Washington, D.C. 20530

If you file your complaint with any of the above FBI officials (other than the EEO Officer), it will be sent to the EEO Office for processing. Also, if you choose to file your complaint with any of the other officials listed above, be sure to provide a copy of your complaint to the EEO Office to ensure prompt processing.

In addition, if you file your complaint or a copy of same with the Department of Justice (DOJ), ensure that you carefully review and comply with the instructions regarding the dissemination of complaint material as contained in the Prohibited Communications form furnished you. This is necessary since not all employees of the DOJ have top secret clearances. It should be emphasized that a complainant may not wittingly or unwittingly disclose sensitive/classified information to individuals/agencies not having the appropriate security clearance to receive such information. To avoid inadvertent disclosure of sensitive or classified information that may be contained with the filing of a complaint form, it is suggested that all FBI employees file their complaints with the FBI's Equal Employment Opportunity Officer.

The complaint must be specific and encompass only those matters discussed with me. If you retain an attorney or any other person to represent you, you and your representative must immediately notify the EEO Officer, in writing. You and/or your representative will receive a written notice of receipt of your discrimination complaint. Regarding your contacts with your representative, ensure you comply with instructions in the Prohibited Communications form.



U.S. Department of Justice

Complaint Adjudication Office

Agency Complaint Number [redacted]

DJ Number [redacted]

950 Pennsylvania Avenue, N.W.
Patrick Henry Building, Room A4810
Washington, DC 20530

SEP 14 2012

b6



Dear [redacted]

This is in reference to the discrimination complaint that you filed against the Federal Bureau of Investigation. Under the Department of Justice's equal employment opportunity regulations, the Complaint Adjudication Officer renders the final Department of Justice decision on your complaint. Enclosed is the final Department of Justice decision. Please note that the portion of this decision addressing your claim of discrimination on the basis of parental status cannot be appealed.

RECEIVED
2012 SEP 18 1 P 2
OFFICE OF EEO AND AFFAIRS

Rights of Appeal

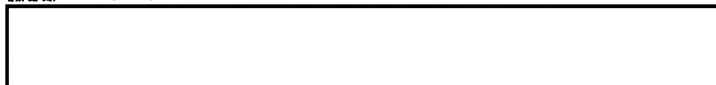
First, you have the right to appeal any part of the decision (except the parental status analysis, as noted above) to the Equal Employment Opportunity Commission (EEOC). You may do so by filing your appeal within 30 days of the date you receive this decision. If you are represented by an attorney of record, the 30-day appeal period shall begin to run the day your attorney receives this decision. The appeal must be in writing. The Commission prefers that you use EEOC Form 573, Notice of Appeal/Petition, a copy of which is attached, to appeal this decision. The notice of appeal should be sent to Carlton Haddon, Director, Office of Federal Operations, EEOC, Post Office Box 77960, Washington, D.C., 20013, by mail, personal delivery, or facsimile. You must also send a copy of your notice of appeal to [redacted] Acting EEO Officer, Federal Bureau of Investigation, Room 7901, JEH Building, 935 Pennsylvania Avenue NW, Washington, D.C., 20535. You must state the date and method by which you sent the copy of your notice to [redacted] either on, or attached to, the notice of appeal you mail to the EEOC.

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Second, you have the right to file a civil action in the appropriate United States District Court within 90 days of the date you receive this decision. In filing your federal complaint, you should name Attorney General Eric H. Holder, Jr. as the defendant.

SET TICKLER TO [redacted]

REQUEST FOR RECONSIDERATION OR CIVIL ACTION FILED

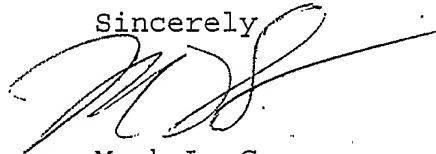


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Even if you appeal this decision to the EEOC, you still have the right to go to federal court. You may file a civil action in the United States District Court within 90 days of the day you receive the Commission's final decision on your appeal, or after 180 days from the date you filed your appeal with the Commission, if the Commission has not made a final decision by that time.

If you cannot afford to file a civil action, you can ask the court to allow you to file the action at no cost to you. The court may also provide you with an attorney if you cannot afford to hire one to represent you in your civil action. Questions concerning when and how to file a waiver of costs should be directed to your attorney or the District Court clerk.

Sincerely



Mark L. Gross
Complaint Adjudication Officer

cc:



b6

NOTICE OF APPEAL/PETITION
TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OFFICE OF FEDERAL OPERATIONS
P.O. Box 77960
Washington, DC 20013

Complainant Information: (Please Print or Type)

Complainant's name (Last, first, M.I.)	
Home/mailing address	
City, State, ZIP Code	
Daytime telephone # (with area code)	
E-mail address (if any)	

Attorney/Representative Information (if any):

Attorney name	
Non-Attorney Representative name	
Address	
City, State, ZIP Code	
Telephone number (if applicable)	
E-mail address (if any)	

General Information:

Name of the agency being charged with discrimination	
Identify the Agency's complaint number	
Location of the duty station or local facility in which the complaint arose	
Has a final action been taken by the agency, an Arbitrator, EEOA, or MSPB on this complaint?	<input type="checkbox"/> Yes; Date Received _____ (Remember to attach a copy) <input type="checkbox"/> No <input type="checkbox"/> This appeal alleges a breach of settlement agreement
Has a complaint been filed on this same matter with the EEOC, another agency, or through any other administrative or collective bargaining procedures?	<input type="checkbox"/> No <input type="checkbox"/> Yes (Indicate the agency or procedure, complaint/docket number, and attach a copy, if appropriate)
Has a civil action (lawsuit) been filed in connection with this complaint?	<input type="checkbox"/> No <input type="checkbox"/> Yes (Attach a copy of the civil action filed)

NOTICE: Please attach a copy of the final decision or order from which you are appealing. If a hearing was requested, please attach a copy of the agency's final order and a copy of the EEOC Administrative Judge's decision. Any comments or brief in support of this appeal MUST be filed with the EEOC and with the agency within 30 days of the date this appeal is filed. The date the appeal is filed is the date on which it is postmarked, hand delivered, or faxed to the EEOC at the address above.

Signature of complainant or complainant's representative	
Date	



U.S. Department of Justice

Complaint Adjudication Office

Agency Complaint Number [REDACTED]
DJ Number [REDACTED]

b6

SEP 14 2012

950 Pennsylvania Avenue, N.W.
Patrick Henry Building, Room A4810
Washington, DC 20530

DEPARTMENT OF JUSTICE FINAL AGENCY DECISION

in the matter of

[REDACTED] vs. Federal Bureau of Investigation

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On February 3, 2011, complainant [REDACTED] filed an employment discrimination complaint against the Federal Bureau of Investigation (FBI) pursuant to Section 717 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16 (Title VII). The issues accepted for investigation are whether complainant suffered discrimination based on his race (black) and prior protected EEO activity when, on September 28, 2010, he learned that the FBI released negative information about him to another agency.

The Complaint Adjudication Office received this case for issuance of a final Department of Justice decision on July 18, 2012.

Facts

I. Complainant's Allegations

Complainant [REDACTED] (black) stated that in December 2008 he applied for an [REDACTED] position with the FBI. Record of Investigation ("R"), ex. 9, p. 2. Complainant stated that he passed his panel interview, drug test, and physical examination for that position. Ibid.

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Complainant stated that on April 27, 2009, a white man administered the required FBI polygraph examination to complainant. Ibid. Complainant stated that the examiner "asked a number of inappropriate questions and made a number of false assumptions about me based on my race, [REDACTED]"

Ibid. Complainant stated that the examiner "assumed that I had used illegal drugs at some point while growing up, and told me he did not believe me when I said I had not used such drugs." Ibid. Complainant stated that the examiner accused him of lying, and claimed that the examination indicated that complainant was being deceptive. Ibid.

Complainant stated that later in 2009 he learned that he had not been selected for the FBI position. Id. at 3. Complainant stated that he then filed an EEO claim against the FBI claiming that the FBI polygraph examiner had subjected him to discrimination on the basis of race and national origin. Ibid. Complainant stated that his initial EEO claim was still pending. Ibid.



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Complainant stated that the results of his FBI polygraph test should not have been released to anyone until his EEO complaint had been resolved. Ibid.

II. Management's Response

[redacted] stated that he was the Unit Chief of the Polygraph Unit of the FBI at the relevant times. Ex. 10, p. 1. [redacted] stated that he had reviewed the results of complainant's April 27, 2009, polygraph examination and determined that complainant had given deceptive answers to questions related to complainant's "suitability." Id. at 2-3. [redacted] stated that race plays no role in the interpretation of polygraph results. Id. at 3.

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[redacted] stated that she was the Acting Section Chief of the National Name Check Section for the FBI at the relevant times. Ex. 11, p. 1. [redacted] stated that her section is responsible for disseminating information from FBI files in response to requests from other federal agencies. Id. at 2. [redacted] noted that her section is authorized to disseminate such information under Executive Order 10450 and Homeland Security Presidential Directive (HSPD) 12. Id. at 2-3. [redacted] stated that on July 24, 2009, her section received a request from the [redacted] for information about complainant. [redacted] stated that, as complainant had applied for a position with the FBI, he had signed an SF-86 form authorizing the FBI to release information about him "for determination of suitability or eligibility for a national security position." Id. at 3. [redacted] stated that her section notified the [redacted] that on April 27, 2009, during a polygraph examination, complainant gave answers "indicative of deception" concerning his use or sale of illegal drugs and the completeness of his application. Ibid.

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III. Relevant Documents

The record contained a redacted April 27, 2009, memorandum from an FBI polygraph examiner that reflected the results of complainant's pre-employment polygraph test. Ex. 12. The report noted that after the examiner confronted complainant about the polygraph results from complainant's answers to questions involving drugs, complainant amended his application to indicate

Ibid.

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The record contained an August 3, 2009, letter from the FBI's National Name Check Program indicating that on April 27, 2009, during a polygraph test, complainant had given deceptive responses to questions concerning drugs and the completeness of his FBI application. Ex. 13. Attached to the letter was a redacted copy of complainant's polygraph examination report. Ibid. Also attached was a March 18, 2009, SF-86 form, signed by complainant. Ibid. The form stated: "I authorize custodians of records and other sources of information pertaining to me to release such information upon request of the investigator, special agent, or other duly accredited representative of any Federal agency authorized above regardless of any previous agreement to the contrary." Ibid.

Analysis

I. Legal Overview

Section 717 of Title VII makes it unlawful for a federal employer to discriminate against an individual because of that person's race or prior protected activity. 42 U.S.C. § 2000e-16.

To establish an inference of racial discrimination under Title VII, the record must show that: 1) complainant belongs to a protected group; 2) complainant was qualified for the position in question; 3) complainant was subjected to an adverse employment action; and 4) similarly situated individuals not in complainant's protected group were treated differently. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); Stevens v. EEOC, EEOC No. 01970848 (August 14, 1997) (citing Smith v. Dep't of the Air Force, EEOC No. 01932276 (May 19, 1994)).

To establish an inference of retaliation under Title VII, the record must show that: 1) complainant engaged in protected conduct; 2) complainant experienced an adverse employment action; and 3) there was a causal connection between the protected conduct and the adverse employment action. Jackson v. United Parcel Service, Inc., 548 F.3d 1137, 1142 (8th Cir. 2008); Enica v. Principi, 544 F.3d 328, 343 (1st Cir. 2008).

For purposes of Title VII claims, an adverse employment action is an action that materially affected the complainant's employment or materially altered the conditions of her workplace. Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 68-71 (2006). For purposes of Title VII retaliation claims, adverse employment actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment. Ibid; Lindsey v. U.S. Postal Serv., EEOC Request No. 05980410 (Nov. 4, 1999) (citing EEOC Compliance Manual No. 915.003 (May 20, 1998)). Instead, the statutory retaliation clauses prohibit sufficiently adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Ibid.

Once an inference of prohibited discriminatory conduct has been established, management may explain its actions. When management offers non-discriminatory reasons for its actions, the complainant's claim will fail unless the evidence demonstrates that management's proffered reasons are not credible, and that management discriminated against the complainant as a result of the complainant's protected trait. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519-525 (1993); Burdine, 450 U.S. at 256; Allen v. Michigan Dep't of Corr., 165 F.3d 405, 409, 412 (6th Cir. 1999).

Agencies charged with protecting classified information have broad discretion in determining who may have access to such information. Dep't of the Navy v. Egan, 484 U.S. 518, 527-29 (1988).

II. Factual Analysis

FBI managers presented a legitimate, non-discriminatory reason for submitting the results of complainant's April 2009 polygraph results to the [redacted] [redacted] stated that the [redacted] requested such information from the FBI as part of its background check on complainant, and the FBI responded to that request pursuant to its legal authority and obligations. It was reasonable for a federal agency to submit relevant background information about an applicant to another federal agency upon request, particularly when such disclosure is authorized by law. No evidence impeached [redacted] statement. No evidence indicated that prohibited discriminatory intent played any role in the FBI's decision to disclose complainant's information to the [redacted] No evidence indicated that [redacted] was ever aware of complainant's race or protected activity. See Holmes v. Potter, 384 F.3d 356, 362 (7th Cir. 2004) (discrimination cases usually fail when management was unaware of a complainant's membership in a protected class). No evidence indicated that any similarly situated applicant received better treatment from FBI management. The documentary evidence further indicated that complainant

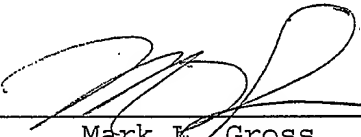
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signed an SF-86 form authorizing the FBI to disclose information about him for purposes of background investigations. No evidence indicated that the FBI acted outside the scope of the disclosure that the SF-86 form permitted.

Complainant claimed that his FBI polygraph examiner subjected him to racial and national origin discrimination during the April 27, 2009, polygraph examination. No evidence in the record corroborated that claim. It was unclear as to why complainant believed that the examiner's questions were discriminatory, particularly as complainant provided additional relevant information to the examiner after the examiner confronted complainant about his answers to certain questions. More important, no evidence indicated that [redacted] or any other FBI manager acted with prohibited discriminatory intent in disclosing the results of the polygraph test to the [redacted]. No evidence indicated that the FBI polygraph examiner played any role in the decision to convey the results of the April 27, 2009, polygraph examination to the [redacted]. Accordingly, complainant's claim fails. b6

Decision

The record did not support complainant's claim that FBI managers discriminated against him on the bases of race and reprisal. Accordingly, complainant's claim is denied.


Mark E. Gross
Complaint Adjudication Officer

[redacted]
Attorney
Complaint Adjudication Office b6

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